TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1968

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, ETC., PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 24, 1968.
CERTIORARI GRANTED NOVEMBER 4, 1968.

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 28,868

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased, Plaintiff-Appellee-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellant-Appellee.

(Cross Appeals)

ON APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Appendix to the Brief for the United States as Appellant

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Docket 9435

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased,

vs.

UNITED STATES OF AMERICA.

For plaintiff:

Curtis K. Thompson, 205 Church St., New Haven, Conn.

For defendant:

Robert C. Zampano, Arnold Markle, Federal Building, New Haven, Conn.

DOCKET ENTRIES

DATE	PROCEEDINGS
1962	
8/29	Complaint filed. Summons issued and with copies of same and of said complaint handed Marshal for service.

[fol. 2]

8/30	Marshal's return showing service, filed.—Summons & complaint.
9/ 5	Appearance of Robert C. Zampano and Arnold Markle entered for defendant.
10/ 4	Motion for Summary Judgment under Rule 56, filed by plaintiff.
"	Affidavit of Charles E. Arntsen in Support of Plaintiff's Motion for Summary Judgment, filed.

DATE	
1962	
10/29	Answer, filed.
11/21	Notice of Motion for Summary Judgment, filed by plaintiff.
"	Memorandum in Support of Motion for Summary Judgment, filed by plaintiff.
12/10	Motion for Continuance, filed by defendant. (Continuance to second Motion Day in January, 1963 of hearing on plaintiff's Motion for Summary Judgment)
12/17	Hearing on (1) Plaintiff's Motion for Summary Judgment and (2) Defendant's Motion for Continuance. (2) Granted and (1) is continued to January 7, 1963 for Judge Timbers further consideration at that time. Anderson, *J.*
12/24	Claim for Court Trial List at New Haven, filed by plaintiff.
[fol. 3]	
1963	
1/ 4	Brief in Opposition to Plaintiff's Motion for Summary Judgment, filed by defendant.
1/ 7	Hearing on Plaintiff's motion for Summary Judgment. Plaintiff has until Jan. 11th, to file Reply Brief. Defendant until Jan. 18th to cover either by letter of brief any new matter that may be reached. Decision Reserved. Timbers, *J.*
1/11	Reply Memorandum, filed by plaintiff.
7/25	Memorandum of Decision on Plaintiff's Motion for Partial Summary Judgment, entered. Summary Judgment on the issue of liability may be entered (1) in favor of defendant on the question of the widow's allowance and (2) in favor of plaintiff

DATE

1963

on the question of proration of estate taxes. Final judgment to be entered within 30 days from the date of this decision; upon stipulation as to the form and amount of judgment, if possible; if not, the form and amount of judgment will be settled upon notice. If any issues remain unresolved after this procedure, the Clerk is directed to set the case for trial at the head of the calendar for the next session of court cases to be tried at New Haven. Timbers, *J*. Copy mailed Thompson, Weir and Barclay and 3 copies handed U.S. Attorney.

8/26 Stipulation that the time for filing a proposed judgment is extended to Sept. 10, 1963, filed. So Ordered. Timbers, *J*. Copies mailed U.S. Attorney and Attorney Thompson.

[fol. 4]

9/16 Stipulation that the time for filing proposed judgment is extended to September 20, 1963, filed. So Ordered. Timbers, *J*. Copies mailed to U.S. Attorney and Attorney Weir.

9/20 Motion for Entry of Judgment and Notice of Motion, filed by defendant.

9/23 Motion for Entry of Judgment, attached form of Judgment and Notice of Motion, filed by plaintiff.

10/ 3 Brief for the Defendant in Support of its Motion for Entry of Judgment and in Opposition to Plaintiff's Motion for Entry of Judgment, filed.

10/ 7 Hearing on (1) Defendant's Motion for Entry of Judgment and (2) Plaintiff's Motion for Entry of Judgment. Robert F. Sama, Dept. of Justice admitted for purposes of this case. Plaintiff's Memorandum in support of its motion, filed.

DATE

1963

Govt. may file reply to plaintiff's memo by 10/17/63. Decisions reserved. Timbers, *J.*

10/16 Reply Memorandum in Support of Defendant's Motion for Entry of Judgment, filed.

12/ 2 Order on Cross-Motions for Entry of Judgment, entered. Plaintiff's Motion for Entry of Judgment is granted. Defendant's Motion for Entry of Judgment is denied. It is Ordered that the Clerk enter judgment. Timbers, *J.* Copies mailed U.S. Attorney and Attorney Thompson.

[fol. 5]

12/ 2 Judgment entered that the plaintiff recover of the defendant $1,485,293.86 with interest at the rate of 6% per annum from the 29th day of May, 1962 and that this Court retain jurisdiction of this action. Earl, *C.* Copies mailed U.S. Attorney and Attorney Thompson.

1964

1/24 Notice of Appeal, filed. Copy mailed Attorney Thompson and copies returned to U.S. Attorney.

1/27 Notice of Cross-Appeal, filed. Copies handed to U.S. Attorney.

2/28 Motion for Order Extending Time to Docket Appeal and File Record, filed. Ordered Accordingly. Timbers, *J.* Copy mailed Atty. Thompson and copies handed U.S. Attorney.

4/15 Record on Appeal mailed Clerk, U.S. Court of Appeals, with two copies of Index. Copies of Index mailed Attys. Thompson and Zampano.

4/22 Receipt for Record on Appeal received from Clerk, U.S. Court of Appeals.

[fol. 6]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed August 29, 1962

The plaintiff for its complaint herein alleges as follows:

1. This is a civil action seeking the recovery of certain monies, part of which the defendant received on December 16, 1959, and part on May 29, 1962 to and for the use of the plaintiff. It arises under the laws of the United States of America providing for internal revenue in that such monies represent federal estate taxes and interest thereon which are alleged to have been erroneously and illegally assessed and unlawfully collected. The suit is brought against the United States of America pursuant to Section 1346 (a) (1) of Title 28 of the United States Code.

2. The Second National Bank of New Haven is a corporation organized and existing under the national banking laws and is located in the City of New Haven in the State of Connecticut, and it is the executor of the last will and codicil thereto of Frederick F. Brewster, late of Hamden, Connecticut, deceased, and brings this action in its capacity as such executor.

3. Said Frederick F. Brewster died a citizen of the United States and a resident of the Town of Hamden, State of Connecticut on September 16, 1958. His last will and codicil thereto were admitted to probate by the Probate Court for the District of Hamden in the State of [fol. 7] Connecticut on October 6, 1958 and thereupon letters testamentary were issued to the plaintiff, The Second National Bank of New Haven, and to Harry E. Ross, who duly qualified as executors thereof. Said Harry E. Ross continued to serve as an executor until May 7, 1962 when his resignation as such was accepted by the Probate Court for the District of Hamden. A true copy of said will and codicil is hereto annexed and marked Exhibit A.

4. The Probate Court for the District of Hamden after hearing duly held on application of such executors, on

February 2, 1959 entered an order in the proceedings for the settlement of the estate of said decedent directing the payment to Margaret F. Brewster, the widow of said decedent, of an allowance for her support during the settlement of the estate. In compliance with such order, the executors on March 13, 1959 paid the amount of said allowance to said Margaret F. Brewster.

5. On December 16, 1959 and within the time prescribed by law, said The Second National Bank of New Haven and Harry E. Ross, as executors aforesaid, filed a federal estate tax return for the estate of said decedent with the District Director of Internal Revenue in Hartford, Connecticut and paid to him the amount of tax shown by said return to be due. In such return the executors reported that various property interests had passed from said decedent to his surviving spouse, Margaret F. Brewster, which were deductible in computing the taxable estate by virtue of Section 2056 of the Internal Revenue Code of 1954. Such property interests included the allowance referred to in paragraph 4 hereof and also the one-third [fol. 8] part of decedent's residuary estate bequeathed in trust by Part I of Article Nine of his will, computed without reduction on account of federal estate taxes attributable to such residuary estate. In such return the executors elected to have the gross estate of the decedent valued as of the alternate dates authorized by Section 2032 of said Internal Revenue Code.

6. The District Director of Internal Revenue by letter to the executors dated October 18, 1961 and an accompanying report on his examination of the federal estate tax return, notified them of certain adjustments or conclusions with respect thereto and proposed a deficiency in federal estate tax liability resulting principally from adjustments to the amount allowable as a marital deduction. Thereafter the executors, by their attorneys, filed a protest against certain of such adjustments and otherwise opposed the assessment of any such deficiency.

7. On November 10, 1961, the executors made an application to said Probate Court, pursuant to Chapter 218 of the General Statutes of Connecticut, Revision of 1958, as amended, for a determination as to how the federal estate tax on the residuary bequests should be prorated between such bequests. Such application was accompanied by a computation whereby the executors proposed a determination that the federal estate taxes attributable to the residuary estate should be charged against so much of the residuary estate as passed under Part II of Article Nine of the decedent's will and that no portion thereof should be charged against the one-third part of the residuary estate passing under Part I of said Article Nine. A true [fol. 9] copy of the aforesaid application and computation is hereto annexed and marked Exhibit B.

8. On November 15, 1961, the executors caused to be mailed, postage prepaid, to the District Director of Internal Revenue at Hartford, Connecticut a true copy of the aforesaid application of the executors and attached computation and of the order of the Probate Court for a hearing to be held thereon on November 27, 1961.

9. After hearing duly held on November 27, 1961 on said application, Exhibit B, said Probate Court entered an order which determined that the federal estate tax be prorated in the manner and in the amounts set forth in the said application of the executors and which authorized, empowered and directed the executors to charge the prorated amounts against the persons against whom the tax was so prorated as set forth in said application and computation.

10. The Commissioner of Internal Revenue, by a letter to the executors dated April 6, 1962, purported to determine a deficiency in the estate tax liability of the estate of said decedent. Such deficiency resulted in part from

(a) a purported determination that the allowance for the support of decedent's widow, referred to in paragraph

4 hereof, was not a property interest passing from the decedent to his surviving spouse within the meaning of Section 2056(a) of the Internal Revenue Code of 1954 and was not deductible from the value of the gross estate in determining the value of the taxable estate; and

[fol. 10] (b) a purported determination that the full amount of the federal estate tax on the residuary estate should not be charged against so much of the residuary estate as passed under Part II of Article Nine of the decedent's will but that the one-third part of decedent's residuary estate bequeathed in trust under Part I of Article Nine of said will and to be deducted from the value of the gross estate in determining the value of the taxable estate, should be computed after the deduction of all federal estate taxes from the residue.

A true copy of the aforesaid letter of the Commissioner of Internal Revenue dated April 6, 1962 and the statement accompanying it is hereto annexed and marked Exhibit C.

11. The purported determinations of the Commissioner of Internal Revenue, referred to in paragraph 10 hereof were erroneous and illegal and contrary to the laws of the State of Connecticut and of the United States of America.

12. On May 12, 1962, the plaintiff waived certain restrictions on the assessment and collection of the alleged deficiency in federal estate taxes, but without prejudice to the right of the executor to sue for the refund of all or any part of the tax or deficiency, by executing and delivering to the District Director of Internal Revenue a written instrument, a true copy of which is hereto annexed and marked Exhibit D.

13. Thereafter and on or about May 25, 1962, the District Director of Internal Revenue assessed additional federal estate taxes against said estate in the sum of $1,333,194.35 and demanded payment thereof by the plaintiff with interest thereon in the amount of $195,285.58 and

[fol. 11] on May 29, 1962 the plaintiff made payment of such sums under protest. A true copy of the letter of the attorneys for the executors transmitting such payment and the receipt of the District Director of Internal Revenue is hereto annexed and marked Exhibit E.

14. Such deficiency resulted from the erroneous and illegal determinations of the Commissioner of Internal Revenue, referred to in paragraphs 10 and 11, and therefore the assessment and collection of such taxes and interest thereon was unlawful.

15. On or about June 7, 1962, the plaintiff filed with the District Director of Internal Revenue at Hartford, Connecticut, a claim for the refund of such sums as had been erroneously and illegally assessed against and collected from the estate of its decedent as alleged herein, together with interest thereon. A true copy of such claim for refund is hereto annexed and marked Exhibit F.

16. The Commissioner of Internal Revenue, by letter dated August 14, 1962 and report attached thereto, notified the plaintiff of the disallowance and denial of such claim for refund. A true copy of such letter and report is hereto annexed and marked Exhibit G.

17. A reasonable amount representing fees incurred or paid by the plaintiff for services rendered or to be rendered by its attorneys in contesting the deficiency in federal estate taxes asserted by the Commissioner of Internal Revenue and in prosecuting the aforesaid claim [fol. 12] for refund of such taxes and this action may, pursuant to Section 212 and Regulations §1.212-1 (i) be deducted by the plaintiff in determining its liability for federal income taxes in the year paid or in determining the liability of said estate for federal estate taxes. Pursuant to Regulations §20.2053-3 (T.D. 6296, June 23, 1958) the plaintiff states that it may claim such deduction in determining the federal estate tax liability.

18. By reason of the premises, the defendant had and received monies of the plaintiff and became indebted to it in a sum exceeding $1,600,000 with interest as follows:

(a) on $1,333,194.35 from May 29, 1962;

(b) on $195,285.58 from May 29, 1962; and

(c) on all amounts in excess of the foregoing from December 16, 1959.

The defendant has not paid said sum or any part thereof to the plaintiff or the estate of its decedent and the amount thereof remains due and owing from the defendant to the plaintiff.

Wherefore, the plaintiff prays that this Court adjudge:

(1) whether the aforesaid allowance paid by the executors and referred to in paragraph 4 above was a property interest that passed from the decedent to his surviving spouse within Section 2056 of the Internal Revenue Code of 1954 and was deductible from the value of the gross estate in computing the taxable estate;

[fol. 13] (2) whether any part of the federal estate tax attributable to the residue of the estate should operate to reduce the value of the property passing to the surviving spouse of the decedent under Part I of Article Nine of the will of said decedent as altered by the codicil thereto;

(3) the amount of the overpayment of federal estate taxes and interest thereon made by the plaintiff; and

(4) that the plaintiff have judgment against the defendant in the amount of such overpayment of federal estate taxes and interest with interest thereon from the dates of overpayment.

Curtiss K. Thompson, of Thompson, Weir & Barclay, 205 Church Street, New Haven, Connecticut, Attorneys for Plaintiff.

[fol. 14]

IN UNITED STATES DISTRICT COURT

EXHIBIT A, ANNEXED TO COMPLAINT

LAST WILL AND TESTAMENT

of

FREDERICK FOSTER BREWSTER

Date: June 5th, 1958

I, Frederick Foster Brewster, of the Town of Hamden, County of New Haven and State of Connecticut, do make, publish and declare this to be my last will and testament, hereby revoking all wills and codicils thereto heretofore made by me.

ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate.

TWO: I give, devise and bequeath to my wife, Margaret F. Brewster, the use of our home, known as Edgerton, consisting of lands and buildings located on Whitney Avenue, in the Towns of Hamden and New Haven, during her [fol. 15] lifetime or until such time as she chooses not to occupy the property and so notifies the Trustee of the trust fund created in Part I of Article Nine hereof.

Upon termination of my wife's use of such real property, I give and bequeath the collection of twenty-four bird pictures, painted by Louis Agassiz Fuertes mounted in the study of my home, to Cornell University, in Ithaca,

New York, and the said Trustee shall cause the same to be transferred and delivered to it. I believe the enjoyment of these paintings will be enhanced if viewed in a quiet and restful environment and, accordingly, if Cornell University should wish to exhibit them in a room such as my study and for which they were commissioned to be made, I also give and bequeath to it the teak paneling, flooring, doors, windows, fireplace and other fixtures and structures with which such room is finished and the sum of Thirty Thousand Dollars ($30,000.), so that the study may be substantially reconstructed in a building of the University.

Upon termination of my wife's use of such real property, I direct the said Trustee to cause the dwelling house to be razed and the ground on which it stood to be suitably graded and seeded; and, I then give, devise and bequeath such real property with the improvements thereon to the City of New Haven, a municipal corporation of the State of Connecticut, to be forever held by it and used as a public park and for no other use whatever. If such gift is accepted by the City, I direct that said Trustee in its discretion may cause such repairs and improvements to be made to the Gate House on the property that it will be reasonably suitable as a residence for a park superintendent. If the City of New Haven does not accept such [fol. 16] gift, I give, devise and bequeath such real property to the aforesaid Trustee to be held as part of the trust fund created in Part I of Article Nine hereof, and to follow the disposition thereof.

I also give and bequeath to Cornell University the booklet which Louis Agassiz Fuertes prepared and submitted to me entitled, "Preliminary Studies for Decorative Panels; House of F. F. Brewster, New Haven, Connecticut".

All sums of money required to effectuate the provisions of this Article shall be paid by said Trustee out of the principal of the trust fund created in Part I of Article Nine hereof.

THREE: I give and devise to my wife, Margaret F. Brewster, to be hers absolutely, our summer home in Dublin, New Hampshire, known as Morelands, and also two (2) pieces of land with a house on each located in New Haven, at No. 26 Burns Street and at No. 80 Cliff Street.

FOUR: I give and bequeath to my wife, Margaret F. Brewster, such of the contents, furnishings and equipment of our homes Edgerton and Morelands, as I may own, and also all of my automobiles, paintings and works of art, silver and other plate, books, jewelry, watches, clocks, furniture, guns, dogs, wearing apparel, and all my personal effects of every kind and description, excepting, however, the paintings and booklet described in Article Two and any supplies, furnishings, tools and equipment located at Brookfield Farm in Durham.

FIVE: (A) I give and bequeath to each of the persons hereinafter named, provided he or she shall be in the em- [fol. 17] ploy of my wife or myself at the time of my death or shall be receiving a pension or retirement pay from either of us at that time, the sum set against his or her name, to wit:

(1) To Harry E. Ross, Fifty Thousand Dollars ($50,000).

(2) To Philip J. Rich, Ten Thousand Dollars ($10,000).

(3) To Alvin F. Rich, Ten Thousand Dollars ($10,000).

(4) To George M. Finnie, Ten Thousand Dollars ($10,000).

(5) To John Churchill, Ten Thousand Dollars ($10,000).

(6) To William Sutherland, Ten Thousand Dollars ($10,000).

(7) To Hugh A. Young, Bernard K. Barrett and George Jones, Ten Thousand Dollars ($10,000) each.

(8) To George S. Watrous, Five Thousand Dollars ($5,000).

(9) To Margaret Winter, Four Thousand Dollars ($4,000).

I direct that the acceptance of any one of the foregoing bequests shall exclude the recipient from the benefit of the provisions of Article Six.

(B) I give and bequeath to Beatrice Trower, Clara Margaret Peterson, Florence Lyon Tessie Mae Lintzner, [fol. 18] Mary Ellen Hughes and Marie Walsh Barrett, One Thousand Dollars ($1,000) each. Because their employment has been intermittent only, these persons are not mentioned in sub-division (A) hereof and are not within the provisions of Article Six. These bequests are made upon condition that the recipient shall have been employed by me or by my wife either steadily or intermittently during the twelve-month period immediately preceding my death.

Six: I give to each person who at the time of my death shall be actively employed by my wife or by me at our homes Edgerton, or Morelands, or my farm in Durham, Connecticut, known as Brookfield Farm, a sum of money which shall be determined as follows: the sum of One Hundred Dollars ($100) for each year of active service in such employment to and including five, plus the sum of One Hundred Fifty Dollars ($150) for each additional year of active service in such employment to and including fifteen, plus the sum of Two Hundred Dollars ($200) for each additional year of active service in such employment to and including twenty-four; but if such person has been in such employment for twenty-five or more years, such sum shall be Five Thousand Dollars ($5,000). In determining the length of service of any person, I direct that an absence of not more than three months due to illness or authorized vacation shall not be deemed to have inter-

rupted the employment, and that the year of my death and the year of entering the employment shall be considered as one year.

SEVEN: I give and bequeath to my friend, Roger P. Tyler, the sum of Twenty Thousand Dollars ($20,000).

[fol. 19] EIGHT: The omission from this my will of any provision for my oldest son John Brewster is intentional and for causes which do not reflect any estrangement between us.

NINE: All the rest, residue and remainder of my estate, of whatever kind and wherever located, shall be distributed as hereafter directed:

Part I. One-third (⅓) thereof, I give, devise and bequeath to the trustee hereafter named, but upon trust, to pay the net income therefrom to my wife, Margaret F. Brewster, quarterly, during her lifetime, and upon her death to convey, assign, transfer and pay over, free of trust, the properties constituting the principal of such trust fund and any accrued or unexpended income, in equal shares, to my children Elmina, Frederick and William, or their survivors or survivor; provided, however, that if any child is then deceased having left issue then surviving, such issue shall take equally, *per stirpes,* the share such child would have received had he or she survived. I further direct and authorize the trustee to use and expend so much of the principal of the trust fund as is required to effectuate the provisions of Article Two hereof.

Part II. Two-thirds (⅔) thereof I give, devise and bequeath to the trustee hereafter named, upon trust, for the uses and purposes hereafter stated:

(a) The trustee shall divide the properties constituting such two-thirds (⅔) part into as many equal shares as are necessary to provide one for each of my grandchildren then surviving. Each of such shares shall constitute a trust fund for and be designated with the name of one [fol. 20] of such grandchildren. Each of the trust funds

thus established shall continue until the grandchild for whom designated attains the age of thirty (30) years or dies, whichever event shall first occur, and thereupon such trust shall terminate.

(b) The net income of each fund, in the discretion of the trustee, may be used and expended for the support, maintenance, education and welfare of the grandchild for whom designated, or it may be accumulated and from time to time added to the principal of the fund. If the trustee in its discretion pays such net income or a part thereof to the guardian of such grandchild or to the person with whom such grandchild is residing, it shall not be required to account further for the same. If a grandchild is twenty-one years of age or later attains that age, the trustee shall thereafter and until the termination of the trust pay one-half (½) of the net income of his or her fund, in quarterly instalments, to such grandchild.

(c) Upon termination of such a fund by reason of the grandchild for whom designated attaining the age of thirty (30) years, the principal thereof, including any additions thereto and any accumulated, unexpended or accrued income thereof, shall be conveyed, assigned, transferred and paid over to such grandchild, freed and discharged of all trust.

(d) Upon termination of such a fund by the death of the grandchild for whom designated, the principal thereof, including any additions thereto and any accumulated, unexpended or accrued income thereof, shall be conveyed, assigned, transferred and paid over to the person or persons appointed and in the amounts or proportions pre-
[fol. 21] scribed by such grandchild in exercising the power of appointment granted for the remainder of such fund in paragraph (e) hereof; or if such grandchild has not effectually or completely exercised such power, then such property as is not disposed of, shall be conveyed, assigned, transferred and paid over to the then surviving issue of

such grandchild, in equal shares, *per stirpes,* freed and discharged of all trust; or, if there be no such surviving issue, then such property shall be divided into as many equal parts as are necessary to provide one part for each similar fund that then exists hereunder or that has terminated and has been distributed, and one of such parts shall then be conveyed, assigned, transferred and paid over to the trustee of each such fund then in effect to be added to the principal and follow the disposition thereof and to the person or persons to whom a fund has been distributed, or their executors or administrators, and in the same proportions as were used in such prior distribution.

(e) I give and grant to each grandchild for whom a fund is designated the right and power by his or her last will to appoint the person or persons who, upon his or her death before attaining the age of thirty (30) years, shall receive the remainder of such fund; and further, to prescribe the amounts or proportions of such remainder to be received by such person or persons; but I require that such right and power shall not be exercised by such a grandchild in favor of himself or herself, or his or her estate, or creditors, or the creditors of his or her estate, or in favor of any person who is not his or her spouse or a descendant of mine.

[fol. 22] TENTH: I hereby constitute and appoint The Second National Bank of New Haven, a corporation organized under the banking laws of the United States and located in the City of New Haven, the trustee under Article Nine of this my will. In the administration of the trust funds created in such article, the trustee shall have the powers hereafter set forth:

(a) The trustee shall have full power and authority to hold and manage the assets of such funds and to sell, exchange or otherwise dispose of them or any part thereof, whether real or personal, for cash or upon credit, and

upon such terms and conditions and for such prices or other considerations, including stocks, bonds or other securities of any corporation, as in its discretion are fair and reasonable; to invest and reinvest the assets of the funds in stocks, bonds, securities and other property, real or personal; to borrow money and to mortgage or hypothecate all or any part of the assets of the funds to secure such borrowings; to vote any corporate stock held in any fund, by proxy or other representative, with or without the power of substitution; to take part in reorganizations, sales, mergers, consolidations, foreclosures and liquidations of corporations the stocks, bonds or other securities of which may be held in any fund and to deposit such stocks, bonds or other securities with protective committees or otherwise to secure the payment or adjustment thereof; to erect, repair, alter, rebuild, remove or demolish buildings or other improvements on any real property that may become a part of any fund; to lease lands and buildings for terms not exceeding ninety-nine (99) years [fol. 23] and not terminable at the termination of the trust on any proper rental basis; to retain and employ counsel and attorneys, accountants, bookkeepers, clerks, architects and such other agents or labor as the trustee may deem desirable; to make, execute and deliver all deeds, assignments, conveyances, contracts, mortgages, bills of sale and such other instruments as shall be necessary or convenient in exercising powers granted to it and in effectuating the purposes of the funds.

(b) The trustee shall be entitled to compensation for its services, in such amounts and proportions as it shall determine, in the exercise of its discretion, to be fair and reasonable; and further, it shall have power to determine whether such compensation is payable out of income or principal.

(c) The trustee shall have power and authority to make every division and distribution necessary in the establishment, administration and settlement of the funds without

the appointment of distributors and without converting any property into cash, to make all appraisals required for such purposes, and to divide, set apart and distribute property in such manner as shall be determined by it, in the exercise of its discretion, to be fair and equitable.

(d) No purchaser of any property sold by the trustee and no transfer agent or registrar of securities bought or sold by the trustee shall be under any duty to inquire into the validity or propriety of such purchase or sale or to follow the application or disposition by the trustee of any sum of money paid to it.

[fol. 24] (e) All the rights, powers, privileges and immunities granted to the trustee named in this article may be exercised and enjoyed by any bank or trust company that might be appointed successor trustee.

ELEVEN: I hereby appoint said The Second National Bank of New Haven and Harry E. Ross, of New Haven, Connecticut, or their survivor, to be the executors of this my last will. I hereby authorize and empower my said executors, their survivor and successors, to make every division and distribution required by this will without the appointment of distributors and without requiring the conversion of any property into cash; and, for the purpose of every such division and distribution they may make appraisal, set apart and distribute property as and in such manner as shall be determined by them, in the exercise of their discretion, to be equitable, pursuant to the provisions of this will. I further authorize and empower them to lease and mortgage any part or all of the property of my estate, real or personal, not herein specifically bequeathed and to sell and convey the same upon such terms as they may deem expedient and if it appears that settlement of the estate will be protracted, to invest and reinvest any part of the assets thereof. I also authorize and empower them to continue the operation of my farm in Durham, known as Brookfield Farm, if in their judgment

that will facilitate a sale thereof, and any deficit incurred in the operation thereof shall be paid out of my estate as an expense of administration; but I direct my executors to grant to my children, or any one of them who wishes, an option to purchase the stables on such farm, their contents, and so much of the surrounding land as such [fol. 25] child or children wish, within six (6) months following my death, at the price for which the same may have been appraised in the inventory of my estate.

I direct that my said executors, or either of them, shall not be required to give any bond or other security for the faithful performance of their duties as such executors in any state or states where it may be necessary or convenient to make proof of this my last will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, at Hamden, Connecticut this 5th day of June, 1958.

/s/ Frederick Foster Brewster (L.S.)

Signed, sealed, published and declared by the within-named testator, Frederick Foster Brewster, to be his last will and testament, in the presence of us and each of us who, in his presence and in the presence of each other and at his request, have hereunto subscribed our names as witnesses.

/s/ E. Virginia Punzelt	32 High St., New Haven, Conn.
/s/ H. Donald Harris, Jr.	524 Whitney Ave., New Haven, Conn.
/s/ Frank C. Royer, Jr.	86 Cottage St., New Haven, Conn.

[fol. 26]
State of Connecticut,
County of New Haven—ss.:

Personally appeared E. Virginia Punzelt, H. Donald Harris Jr. and Frank C. Royer Jr. who, being duly sworn, depose and say that they witnessed the execution of the within will of the within-named testator, Frederick Foster Brewster; that said testator subscribed said will and declared the same to be his last will and testament in their presence; that they thereafter subscribed their names as witnesses at the request of said testator in his presence and in the presence of each other; that said testator at the execution of said will appeared to them to be of full age and of sound mind and memory, not under any restraint and competent in every respect to make a will; and that they make this affidavit at the request of said testator.

/s/ E. Virginia Punzelt

/s/ H. Donald Harris Jr.

/s/ Frank C. Royer, Jr.

Subscribed and sworn to
this 5th day of June, 1958,
before me,

/s/ Curtiss K. Thompson
Notary Public

[fol. 27]

CODICIL

To

Last Will and Testament

Dated

June 5, 1958

of

Frederick F. Brewster

Dated: July 1st, 1958

I, Frederick F. Brewster, of the Town of Hamden, County of New Haven, State of Connecticut, do make, publish and declare this to be a codicil to my last will and testament dated June 5, 1958.

First: I hereby amend Article Two of my said will in the following respects:

(a) The concluding words of the first paragraph of such article which read, "in Part I of Article Nine hereof" are hereby deleted, and in place of them is substituted the word "herein".

(b) The last paragraph of said Article Two is hereby deleted and in place thereof is substituted the following:

> I give and bequeath the sum of One Hundred Thousand Dollars ($100,000) to the trustee named in Article Ten hereof, and with the powers therein [fol. 28] set forth, upon trust, to hold the same and accumulate the income, and to use and expend both principal and income to effectuate the provisions of this article, and to transfer or pay over any unexpended balance to the several trusts created in Part II of Article Nine hereof, in equal shares.

SECOND: I hereby amend Part I of Article Nine of my said will to read as follows:

Part I. One-third (⅓) thereof I give, devise and bequeath to the trustee hereafter named, but upon trust, to pay the net income therefrom to my wife, Margaret F. Brewster, quarterly, during her lifetime, and upon her death to transfer and pay over the entire principal to such persons, corporations or other parties, including her own estate, and in such amounts or proportions, whether outright, by way of trust or otherwise, as my wife may designate and prescribe in her last will and testament; but if such power is not effectually or completely exercised, then such principal or so much as is not distributable pursuant to the exercise of such power, shall be transferred and paid over, in equal shares, to my children, Elmina, Frederick and William, or their survivors or survivor; provided, however, that if any child is then deceased having left issue then surviving, such issue shall take, equally, *per stirpes,* the share such child would have received had he or she survived.

THIRD: In all other respects I hereby republish and confirm my said will.

[fol. 29] IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, at Hamden, Connecticut, this 1st day of July, 1958.

/s/ Frederick F. Brewster (L.S.)

Signed, sealed, published and declared by the within-named testator, Frederick F. Brewster, to be a codicil to his will dated June 5, 1958, in the presence of us and each of us who, in his presence and in the presence of each other

and at his request have hereunto subscribed our names as witnesses.

/s/ Fanny G. Tyler	East Haven, Conn.
/s/ E. Virginia Punzelt	32 High St., New Haven, Conn.
/s/ H. Donald Harris, Jr.	New Haven, Connecticut

State of Connecticut,
County of New Haven—ss.:

Personally appeared Fanny G. Tyler, E. Virginia Punzelt and H. Donald Harris Jr. who, being duly sworn, depose and say that they witnessed the execution of the within codicil of the within-named testator, Frederick F. Brewster; that said testator subscribed said codicil and declared the same to be a codicil to his last will and testament dated June 5, 1958, in their presence; that they thereafter subscribed their names as witnesses at the request of said testator, in his presence and in the presence of each other; [fol. 30] that said testator, at the execution of said codicil, appeared to them to be of full age and of sound mind and memory, not under any restraint and competent in every respect to make a will or codicil, and that they make this affidavit at the request of said testator.

/s/ Fanny G. Tyler

/s/ E. Virginia Punzelt

/s/ H. Donald Harris Jr.

Subscribed and sworn to
this 1st day of July, 1958,
before me,

/s/ Curtiss K. Thompson, Notary Public

IN UNITED STATES DISTRICT COURT

EXHIBIT B, ANNEXED TO COMPLAINT

November 15, 1961

District Director of Internal Revenue
Hartford, Connecticut

Re: Estate of Frederick F. Brewster

Dear Sir:

The Executors of the estate of Frederick F. Brewster have filed with the Probate Court for the District of Hamden a first administration account and an application for determination of proration of federal estate tax. A [fol. 31] copy of the notice of hearing is enclosed herewith as is a copy of the application for determination of proration of federal estate tax. You will note that the Court has set the hearing for Monday, November 27th, at 2 P.M.

Very truly yours,

/s/ JOHN H. WEIR

JHW:rn
Enc.

To the Probate Court for the District of Hamden:

Estate of FREDERICK F. BREWSTER, late of Hamden, in said District, deceased.

APPLICATION FOR DETERMINATION OF PRORATION OF FEDERAL ESTATE TAX

The subscribers, Executors of the will of said deceased, respectfully represent:

1. They have prepared the attached computation of proposed proration of the Federal Estate Tax (as shown in

the Federal Estate Tax Return corrected in the respects set forth in the notes to said computation), pursuant to the provisions of Chapter 218 of the General Statutes of Connecticut, Revision of 1958, as amended.

2. They desire to set up the residuary trusts in part and to set aside the residuary share of the widow, Margaret F. Brewster, but are unable to do so until there has been a [fol. 32] determination as to how the Federal Estate Tax on the residuary bequests should be prorated between those bequests.

WHEREFORE, the subscribers pray this Court to appoint a time and place for a hearing upon said computation and to make a determination of the proration of the Federal Estate Tax.

HARRY E. ROSS

and

THE SECOND NATIONAL BANK OF NEW HAVEN,

Executors

By /s/ F. B. Harris
Vice President

Subscribed and sworn to by F. B. Harris, as Vice-President of The Second National Bank of New Haven this 6th day of November, 1961, before me,

/s/ Sally L. Byrne
Notary Public.
My Commission expires April 1, 1965.

(seal)

[fol. 33]

Computation of Proposed Proration of Federal Estate Tax

(See opposite) ☞

Computation of Proposed Proration of Federal Estate Tax

(Note 1.—The basis of this computation is the Federal Estate Tax Return as filed except that a typographical error which occurred in totalling the items in Schedule J of the Return has been corrected. The correction of this total causes a change in the amount of the marital deduction, total deductions and the federal estate tax as shown in the return. The corrected totals for all of these items are used in this computation.)

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
I. Insurance None				
II. Widow's Allowance To Margaret F. Brewster	350,000.00	350,000.00	None	None
III. Jointly Owned Property Passing to Margaret F. Brewster, widow	123,872.76	123,872.76	None	None
IV. Transfers During Decedent's Life None				

[fol. 34]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
V. POWERS OF APPOINTMENT None				
VI. SPECIFIC AND PARTICULAR DEVISES AND BEQUESTS NOT TAX-EXEMPT To Margaret F. Brewster, widow:				
Life Use of "Edgerton"	42,579.81	None	42,579.81	None
Life Use of paintings by Fuertes and of booklet of sketches by Fuertes	4,256.08	None	4,256.08	None
"Morelands"	138,000.00	138,000.00	None	None
26 Burns Street	16,000.00	16,000.00	None	None
80 Cliff Street	12,500.00	12,500.00	None	None
Personal Property	75,274.00	75,274.00	None	None
To Harry E. Ross	50,000.00	None	50,000.00	None
To Philip J. Rich	10,000.00	None	10,000.00	None
To Alvin F. Rich	10,000.00	None	10,000.00	None
To George M. Finnie	10,000.00	None	10,000.00	None
To John Churchill	10,000.00	None	10,000.00	None

[fol. 35]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To William Sutherland	10,000.00	None	10,000.00	None
To Hugh A. Young	10,000.00	None	10,000.00	None
To Bernard K. Barrett	10,000.00	None	10,000.00	None
To George Jones	10,000.00	None	10,000.00	None
To George S. Watrous	5,000.00	None	5,000.00	None
To Margaret Winter	4,000.00	None	4,000.00	None
To Beatrice Trower	1,000.00	None	1,000.00	None
To Clara Margaret Peterson	1,000.00	None	1,000.00	None
To Florence Lyon	1,000.00	None	1,000.00	None
To Tessie Mae Lintzner	1,000.00	None	1,000.00	None
To Mary Ellen Hughes	1,000.00	None	1,000.00	None
To Marie Walsh Barrett	1,000.00	None	1,000.00	None
To Charles J. Drazen	5,000.00	None	5,000.00	None
To Patrick Evers	400.00	None	400.00	None
To Edward C. Eyles	100.00	None	100.00	None

[fol. 36]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To Terence F. Gunn	200.00	None	200.00	None
To Richard Haran	5,000.00	None	5,000.00	None
To Olwin Kilpatrick	300.00	None	300.00	None
To Thomas McGoven	400.00	None	400.00	None
To John P. Murphy	200.00	None	200.00	None
To John L. Shanley	500.00	None	500.00	None
To Owen Walsh	5,000.00	None	5,000.00	None
To Edward A. Faulkner	5,000.00	None	5,000.00	None
To Herbert D. Johnstone	950.00	None	950.00	None
To Walter A. Johnstone	100.00	None	100.00	None
To Mary Helen Knowlton	5,000.00	None	5,000.00	None
To Reginald G. Mason	5,000.00	None	5,000.00	None
To Edwin J. Richards	400.00	None	400.00	None
To Richard J. Tucker	400.00	None	400.00	None

[fol. 37]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To Richard J. Dundas	800.00	None	800.00	None
To Lester Burr	2,950.00	None	2,950.00	None
To Benjamin F. Mitchell	1,550.00	None	1,550.00	None
To Cleora F. Rich	5,000.00	None	5,000.00	None
To Rufus P. Rood	1,850.00	None	1,850.00	None
To Reginald T. Bolt	5,000.00	None	5,000.00	None
To Mae Roberts	1,550.00	None	1,550.00	None
To Eileen Shirk	5,000.00	None	5,000.00	None
To Roger P. Tyler	20,000.00	None	20,000.00	None
Totals	511,259.89	241,774.00	269,485.89	None
VII. Tax-Exempt Specific and Particular Devises and Bequests				
To Cornell University: Remainder interest in paintings by Fuertes and in booklet of sketches by Fuertes	16,268.92	16,268.92	None	None
Cash	30,000.00	30,000.00	None	None

[fol. 38]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To City of New Haven: Remainder interest in "Edgerton"	147,827.21	147,827.21	None	None
Cash for demolition of "Edgerton"	70,000.00	70,000.00	None	None
Totals	264,096.13	264,096.13	None	None
VIII. RESIDUE				
To Margaret F. Brewster, widow	3,752,393.16	487,512.29	3,264,880.87	42,326.78
To trusts for grandchildren as follows:				
Barbara Brewster	833,865.14	108,336.06	725,529.08	421,135.96
Vallie Brewster	833,865.14	108,336.06	725,529.08	421,135.96
Priscilla Brewster	833,865.14	108,336.06	725,529.08	421,135.96
Susan Brewster	833,865.15	108,336.06	725,529.09	421,135.96
Pamela Brewster	833,865.15	108,336.06	725,529.09	421,135.96
Margaret Brewster Sewall	833,865.15	108,336.06	725,529.09	421,135.96
William Patrick Brewster	833,865.15	108,336.06	725,529.09	421,135.97

[fol. 39]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
Geoffrey Brewster	833,865.15	108,336.06	725,529.09	421,135.97
Christopher Brewster Sewall	833,865.15	108,336.06	725,529.09	421,135.97
Totals	11,257,179.48	1,462,536.83	9,794,642.65	3,832,550.45

Total Gross Estate from Schedule O of Federal Estate Tax Return	$13,201,347.91
Total Deductions as in Schedule O of Federal Estate Tax Return (as corrected)	5,067,662.12
Net Estate plus specific exemption as in Schedule P of Federal Estate Tax Return (as corrected)	8,133,685.79
Total Federal Estate Tax Payable per computation in Federal Estate Tax Return (as corrected)	3,832,550.45

[fol. 40]

The Total of the Federal Estate Tax allocated against each Beneficiary is therefore as follows (Note 2):

Name	*Amount*
Margaret F. Brewster	$ 42,326.78
Trusts for grandchildren as follows:	
Barbara Brewster	421,135.96
Vallie Brewster	421,135.96
Priscilla Brewster	421,135.96
Susan Brewster	421,135.96
Pamela Brewster	421,135.96
Margaret Brewster Sewall	421,135.96
William Patrick Brewster	421,135.97
Geoffrey Brewster	421,135.97
Christopher Brewster Sewall	421,135.97
Total Federal Tax	$3,832,550.45

Note 2.—The executors have allocated the Federal Estate Tax on the pre-residuary bequests and devises to the residue generally. As a result, the amount of that tax, which has been ascertained by taking the proportion of the total Federal Estate Tax shown on the return as corrected which the amount of the taxable pre-residuary bequests and devises (that is, less those bequests which are charitable or are part of the marital deduction) bears to the total of all taxable bequests and devises, has been allocated one-third to the residuary bequest to the widow, Margaret F. Brewster, and two-twentyseventhes to each of the residuary trusts. On the other hand, the executors have allocated the full amount of the Federal Estate Tax on the residuary bequests to the residuary trusts on the basis of one-ninth of the amount of said tax to each trust.)

[fol. 41]

Exhibit 1

Allocation of Deductions

Part A

The deductions in Schedule O of the Federal return for funeral expenses, executors' commission, attorneys' fees, miscellaneous administration expenses, debts of the decedent and net losses total $617,278.77. These are allocated to residue.

Total $ 617,278.77

Part B

The deductions for charitable, public and similar bequests in Schedule O of the Federal return total $264,096.13. These are allocated to tax-exempt specific devises and bequests (Line VII)

Total 264,096.13

Part C

The deductions for mortgages and liens in Schedule O of the Federal Estate Tax return total—None

Total None

Part D

The marital deduction as in line 11 of Schedule O of the Federal Estate Tax return as corrected, is $4,186,287.22. This is [fol. 42] deductible from the following portions of the gross taxable estate:

Widow's allowance	$ 350,000.00
Jointly owned property	123,872.76
Specific and particular devises and bequests	241,774.00

Residue passing to spouse ($3,752,393.16 less $281,752.70, which is one-third of Connecticut Succession Tax and New Hampshire tax)	3,470,640.46	
Total		4,186,287.22

[fol. 43]

IN UNITED STATES DISTRICT COURT

EXHIBIT C, ANNEXED TO COMPLAINT

[EMBLEM]

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
REGIONAL COMMISSIONER
APPELLATE DIVISION – BOSTON REGION
1221 CHAPEL STREET
NEW HAVEN 11, CONNECTICUT

APR 6 1962

Connecticut
IN REPLY REFER TO
AP:BOS–NH:MK

CERTIFIED MAIL

Date of Death
September 16, 1958

Estate of Frederick F. Brewster
The Second National Bank of New Haven,
and Harry E. Ross, Co-executors
c/o The Second National Bank of New Haven
135 Church Street
New Haven, Connecticut

Gentlemen:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of

the estate tax liability for the above-named estate dis- [fol. 44] closes a deficiency in the amount of $1,333,194.35. The attached statement shows the computation of the deficiency.

IF YOU AGREE to this determination, please sign the enclosed agreement form and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN,
Commissioner

By

L. M. TIGH,
Associate Chief,
Appellate

Enclosures:

Statement

Agreement form 890-B

Addressed envelope

[fol. 45] AP:BOSNH:MK

STATEMENT

Estate of Frederick F. Brewster
The Second National Bank of New Haven,
and Harry E. Ross, Co-executors
c/o The Second National Bank of New Haven
135 Church Street
New Haven, Connecticut

Date of Death: September 16, 1958

ESTATE TAX

Liability	*Assessed*	*Deficiency*
$5,361,808.20	$4,028,613.85	$1,333,194.35

In making this determination of your estate tax liability, careful consideration has been given to the report of examination dated September 27, 1961, to your protest dated November 17, 1961, and to the statements made at the conferences held on February 8, 1962 and March 2, 1962.

It has been determined that the 3,500 shares of stock of United Illuminating Company held by the estate on September 16, 1959, had a value of $28⅛ per share on the alternate valuation date of September 16, 1959, or an aggregate value of $98,437.50.

It has been determined that marital deduction claimed by the taxpayer on account of the bequest of one-third [fol. 46] of the residuary trust for the benefit of the decedent's widow is limited to the amount of $1,682,846.59, and that the amount claimed as marital deduction in excess thereof is not allowable.

It has been determined that the bequest of $30,000.00 to be paid to Cornell University after the death of the decedent's wife is allowable as a charitable deduction in the amount of $23,150.70, which is the value of the be-

quest postponed until after the death of the decedent's wife.

It has been determined that the charitable bequests that are provided for in the will of funds to be used to demolish the main building on the property known as Edgerton and make necessary repairs to the Gate House on said property after the death of decedent's wife, when the said property will be given to the City of New Haven, Connecticut, for park purposes, are allowable as a charitable deduction in the aggregate amount of $23,158.42, which is the postponed value of the respective amounts required therefor of $24,500.00 and $5,510.00, payable after the death of decedent's wife.

A copy of this letter and statement has been mailed to your representative, Mr. Curtiss K. Thompson, c/o Thompson, Weir and Barclay, 205 Church Street, New Haven 10, Connecticut, in accordance with the authority contained in the power of attorney executed by you.

[fol. 47]

Schedule 1

(See opposite) ☞

Schedule 1

Adjustments to Taxable Estate

Taxable estate per return		$ 8,392,892.80
Additions to value of taxable estate and decreases in deductions:		
(a) Stocks and Bonds	$ 875.00	
(b) Other miscellaneous property	1,393.75	
(c) Bequests to surviving spouse	2,180,730.69	
(d) Charitable bequests	58,027.88	2,241,027.32
Total		$10,633,920.12
Deductions from value of taxable estate and increases in deductions:		
(e) Funeral and administrative expenses		478,810.50
Taxable estate as adjusted		$10,155,109.62

[fol. 48]

Schedule 1-A

Explanation of Adjustments

(a) Stocks and Bonds $875.00

	Return	Adjusted
Schedule B—Item 199(J)	$97,562.50	$98,437.50
Addition to value of estate	875.00	—
Total	$98,437.50	$98,437.50

See introductory paragraphs of this statement.

(b) Other miscellaneous property $1,393.75

	Return	Adjusted
Schedule F—Item 19 (added)	0	$ 654.21
Schedule F—Item 20 (added)	0	739.54
Addition to value of estate	1,393.75	
Total	$1,393.75	$1,393.75

It has been determined that an adjustment be made to include in the gross estate, refunds collected by the estate (Item 19), and refund of 1949 and 1950 income tax collected by the estate (Item 20).

(c) Bequests to surviving spouse $2,180,730.69

	Return	Adjusted
Schedule M—Item 6	$ 350,000.00	$ 116,666.67
Schedule M—Item 7	3,630,243.95	1,682,846.59
Addition to value of estate	—	2,180,730.69
Totals	$3,980,243.95	$3,980,243.95

See introductory paragraphs of this statement.

[fol. 49]

(d) Charitable bequests $58,027.88

	Return	Adjusted
Schedule N-12, Item 1(a)	$ 30,000.00	$ 23,150.70
Schedule N-12, Item 1(b)	16,268.92	15,838.94
Schedule N-12, Item 2(a)	147,827.21	143,920.19
Schedule N-12, Item 2(b)	70,000.00	23,158.42
Addition to value of estate	—	58,027.88
Totals	$264,096.13	$264,096.13

See introductory paragraphs of this statement.

(e) Funeral and administrative expenses $(478,810.50)

	Return	Adjusted
Schedule J-1, Item 71	$ 2,825.00	$ 3,102.07
Schedule total	45,535.76	524,069.19
Deduction from value of estate	478,810.50	—
Totals	$527,171.26	$527,171.26

It has been determined that Item 71 is to be allowed in the amount paid and to be paid as per evidence submitted. An adjustment has been made to the schedule total to correct a mathematical error on the return.

[fol. 50]

Schedule 2

Computation of Estate Tax

Taxable estate as adjusted, Schedule 1		$10,155,109.62
Gross estate tax:		
On $10,000,000.00	$6,088,200.00	
On $155,109.62 at 77%	119,434.41	$ 6,207,634.41
Credit for state death taxes substantiated		845,258.09
Balance		$ 5,362,376.32
Credit for foreign death taxes (same as return)		568.12
Estate tax liability		$ 5,361,808.20
Estate tax assessed, DT-3905		4,028,613.85
Deficiency in estate tax		$ 1,333,194.35
*Net deficiency provided additional credit for state death taxes of $255,959.45 is substantiated		$ 1,077,234.90

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter, if a petition is not filed with The Tax Court of the United States, the deficiency of $1,333,194.35 will be assessed. In the event that evidence of the payment of State, territorial estate, (Tr. 41) inheritance, legacy, or succession taxes, as required by Section 2011 of the Internal Revenue Code of 1954 is filed within the ninety-day period, the net deficiency in the amount of $1,077,234.90 will be assessed.

[fol. 51]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT UNDER RULE 56—
Filed October 4, 1962

Now comes the plaintiff in the above entitled action and moves for summary judgment on the issue of liability, and in support of such motion respectfully represents:

1. The amount of damages which the plaintiff is entitled to recover in this action, if any, turns upon the resolution of two issues of law, viz:

(a) Whether the widow's allowance granted to the decedent's surviving spouse by the Probate Court and paid by the executors was a property interest that passed from decedent to such spouse within the meaning of Section 2056 of the Internal Revenue Code of 1954.

(b) Whether the property passing to the surviving spouse of the decedent under Part I of Article Nine of the will, as amended by the codicil, should be reduced in value by any part of the federal estate tax attributable to the residuary estate.

2. The amount of damages recoverable by the plaintiff will vary depending upon the judgment rendered on the aforesaid issues and, therefore, cannot be proven or computed until after such issues are adjudicated.

3. As appears from the pleadings herein and the affidavit of Charles E. Arntsen, verified October 2, 1962, and [fol. 52] filed in support of this motion, there is no genuine issue herein as to any fact material to the plaintiff's cause of action, excepting the amount of damages.

4. The plaintiff is entitled to judgment as a matter of law.

Wherefore, the plaintiff moves pursuant to Rule 56 that a summary judgment be entered in favor of the plaintiff on each of the issues affecting the liability of the defendant.

Dated at New Haven, this 4th day of October, 1962.

Curtiss K. Thompson, of Thompson, Weir & Barclay, 205 Church Street, New Haven, Connecticut.

Certification

This certifies that three true copies of the foregoing Motion for Summary Judgment Under Rule 56 and of the Affidavit of Charles E. Arnsten in Support of Plaintiff's Motion for Summary Judgment were delivered on October 4, 1962 to the United States Attorney, Federal Building, New Haven, Connecticut, attorney for the defendant.

John H. Weir, of Thompson, Weir & Barclay, 205 Church Street, New Haven, Connecticut, Attorneys for Plaintiff.

[fol. 53]

AFFIDAVIT OF CHARLES E. ARNTSEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of Connecticut,
County of New Haven—ss.:

Charles E. Arntsen being duly sworn, deposes and says that he resides at 999 Forest Road in the City of New Haven, County of New Haven and State of Connecticut and that he is and for many years past has been a Trust Officer of The Second National Bank of New Haven, the plaintiff in the above entitled action.

Deponent further says that as a Trust Officer of said bank he has actively participated in the settlement of the Estate of Frederick F. Brewster, late of Hamden, Connecticut, deceased, since his death on September 16, 1958;

that he is familiar with the complaint in this action and knows the contents and allegations thereof, that he is likewise familiar with the Motion for Summary Judgment to be filed herein by the plaintiff and that he makes this affidavit in support of such motion.

Relevant facts are stated in paragraphs below numbered to correspond with the paragraphs of the complaint to which they pertain. Inasmuch as the complaint has annexed to it Exhibits designated, A, B, C, D, E, F and G, the Exhibits annexed to this affidavit are designated H, I, J, K, L, M, N and O.

1. The plaintiff is seeking the recovery of federal estate taxes and interest thereon in a sum exceeding [fol. 54] $1,600,000. which it paid to the District Director of Internal Revenue for the Estate of Frederick F. Brewster, deceased. The dates and amounts of payments made by the plaintiff are as follows:

December 16, 1959	$4,028,613.85	taxes
May 29, 1962	1,333,194.35	taxes
May 29, 1962	195,285.58	interest

2. The Second National Bank of New Haven is a corporation organized and existing under the national banking laws and is located in the City of New Haven in the State of Connecticut and is the executor of the last will and codicil thereto of Frederick F. Brewster, late of Hamden, Connecticut, deceased. This action is brought by said bank in its capacity as such executor. Annexed hereto and marked Exhibit H is a certificate of the Probate Court for the District of Hamden evidencing the appointment of said bank as such executor.

3. Said Frederick F. Brewster at the time of his death on September 16, 1958 was a citizen of the United States and resided at No. 840 Whitney Avenue, Hamden, Connecticut. Exhibit A annexed to the complaint is a true copy of the last will and codicil of said decedent. An-

nexed hereto and marked Exhibit I is a copy of the resignation of Harry E. Ross as executor and of the order of the Probate Court dated May 7, 1962 accepting the same, and certified by said Probate Court.

4. Annexed hereto and marked Exhibit J and certified by the Clerk of said Probate Court is a true copy of the [fol. 55] application of the executors dated February 2, 1959 for an allowance for the support of decedent's widow during the settlement of the estate and of certain proceedings thereon including the order of the Probate Court making such an allowance. In compliance with such order, the executors of the estate of said decedent on March 13, 1959 paid the amount of said allowance, i.e. $350,000. to said Margaret F. Brewster.

5. A federal estate tax return for the estate of said decedent was filed by the executors with the District Director of Internal Revenue in Hartford, Connecticut on December 16, 1958. As appears in paragraph 1 above, the executors then paid the District Director the amount of tax shown by said return to be due. Annexed hereto and marked Exhibit K is a true copy of such parts of said return as are believed to be material to the issues here, consisting of the Computation of Tax and Schedules M, N, O, P and S.

6. Annexed hereto and marked Exhibit L is a true copy of the letter from said District Director of Internal Revenue to the executors dated October 18, 1961 and of the accompanying report on his examination of said federal estate tax return. Also annexed hereto and marked Exhibit M is a true copy of the protest filed by the executors and their attorneys against certain of the adjustments in federal estate tax liability proposed by the District Director. Thereafter the attorneys for the executors and, on one occasion, the deponent attended conferences or hearings before representatives of the Internal Revenue [fol. 56] Service and opposed the assessment of any deficiency in federal estate taxes.

7, 8 and 9. Annexed hereto and marked Exhibit N and certified by the Clerk of said Probate Court is a true copy of an application made by the executors on November 10, 1961 to said Probate Court pursuant to Chapter 218 of the General Statutes of Connecticut, Revision of 1958 for a determination as to how the federal estate tax on the residuary bequests should be prorated between such bequests and accompanying computation and of proceedings in said Probate Court with respect thereto. Exhibit B annexed to the complaint is also a true copy of the aforesaid application and computation.

10. Exhibit C annexed to the complaint is a true copy of the letter of the Commissioner of Internal Revenue dated April 6, 1962 and statement accompanying it which was mailed to and received by the executors.

12. Exhibit D annexed to the complaint is a true copy of a written instrument on Treasury Department Form 890-B, which the plaintiff executed on May 12, 1962 and thereupon delivered to the District Director of Internal Revenue.

13. Annexed hereto and marked Exhibit O is a true copy of a notice on Form 17A of the Treasury Department of additional federal estate taxes in the amount of $1,333,194.35 and interest of $195,285.58 assessed against the estate of said decedent on May 16, 1962 and demand [fol. 57] for the payment thereof which was sent by said District Director of Internal Revenue to the plaintiff. Exhibit E annexed to the complaint is a true copy of the letter of the attorneys for the plaintiff transmitting a check in payment of said sums and of the receipt therefor of the District Director of Internal Revenue.

15. Exhibit F annexed to the complaint is a true copy of the claim for refund which was filed by the plaintiff with the District Director of Internal Revenue on or about June 7, 1962.

16. Exhibit G annexed to the complaint is a true copy of a letter of the Commissioner of Internal Revenue dated August 14, 1962 and report attached thereto which he sent to the plaintiff.

18. The defendant has not paid to the plaintiff or the estate of the decedent the whole or any part of the monies which it received as aforesaid.

Charles E. Arntsen, Trust Officer

Subscribed and sworn to this 2nd day of October, 1962, before me,

John H. Weir, Notary Public, My Commission expires April 1, 1966.

(seal)

[fol. 58]

EXHIBIT K, ANNEXED TO AFFIDAVIT OF CHARLES E. ARNTSEN

Parts of federal estate tax return.

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

Federal Tax Unit

FORM 706
(Rev. Dec. 1955)
U. S. TREASURY DEPARTMENT
Internal Revenue Service

UNITED STATES ESTATE TAX RETURN

(Applicable only to estates of decedents dying on or after August 17, 1954. If decedent died prior to August 17, 1954, use Form 706, Revised December 1953.)

Estates of nonresidents not citizens of the United States may generally file on Form 706NA instead of this form. For details see page 39.

DO NOT WRITE IN SPACE BELOW
Date received

Decedent's name	Date of death
FREDERICK F. BREWSTER	September 16, 1958
Residence (domicile) at time of death	**Citizenship (nationality) at time of death**
840 Whitney Avenue, Hamden, Connecticut	U.S.A.

COMPUTATION OF TAX

(See instructions on page 38)

PART I

1. Gross estate tax (use table A, page 40)		$4,866,798.53
2. Credit for State death taxes (use Table B, page 40)		837,616.56
3. Gross estate tax less credit for State death taxes (item 1 minus item 2). This is the net amount payable unless credit for Federal gift taxes, tax on prior transfers, or foreign death taxes is claimed in Part II		$4,029,181.97

PART II

4. Credit for Federal gift taxes	$ None	
5. Credit for tax on prior transfers	None	
6. Credit for foreign death taxes	568.12	568.12
7. Total of credits under Part II (total of items 4, 5, and 6)		
8. Net estate tax payable (item 3 minus item 7)		$4,028,613.85

(SPACE FOR USE OF INTERNAL REVENUE SERVICE)

Tax on return or deficiency	Assessments				Payments		
	Amount	List	Page	Line	Date	Principal	Interest
	$					$	$

DETERMINATION BY INTERNAL REVENUE SERVICE

[fol. 59]

GENERAL INFORMATION

1. Address of decedent at time of death (Number, street, city, zone, and State)

840 Whitney Avenue, Hamden, Connecticut

2a. State in which domiciled at time of death	2b. Year in which this domicile was established	
Connecticut	1910	
3. Date of marriage to surviving spouse	**4. Domicile at date of marriage to surviving spouse**	**5. Citizenship (nationality) at date of death**
June 11, 1903	New Haven, Connecticut	U.S.A.
6a. Place of death	**6b. Cause of death**	**6c. Length of last illness**
New Haven	Carcinoma of lung	6 months

7. Decedent's physicians

NAMES	ADDRESSES (Number, street, city, zone, and State)
Hugh L. Dwyer, M.D.	309 Edwards Street, New Haven, Connecticut

8. If decedent was confined in a hospital during his last illness or within 3 years prior to his death, give name and address of hospital

Grace-New Haven Hospital
New Haven, Connecticut

9a. Date of birth	9b. Place of birth (City and State or country, if other than United States)	
August 13, 1872	Irvington, New York	
10a. Business or occupation	**10b. If retired, state former business or occupation**	
Own business - Investments	None	

10c. Business address (Number, street, city, zone, and State)

129 Church Street, New Haven, Connecticut

11. Marital status at date of death

☒ Married ☐ Single ☐ Separated ☐ Widowed ☐ Divorced

12a. If widowed, give name of deceased spouse	12b. Date of death	13. Number of children
----	----	Four

14. Heirs, next of kin, devisees, and legatees (If more than five, only the names of the five principal ones are required)

NAME	RELATIONSHIP	ADDRESS (Number, street, city, zone, and State)
Margaret F. Brewster	Wife	840 Whitney Avenue, Hamden, Connecticut
John Brewster	Son	Devon, Pennsylvania
Elmina B. Sewall	Daughter	Brown Street, Kennebunk, Maine
Frederick Brewster	Son	1220 Pioneer Building, St. Paul, Minnesota
William Brewster	Son	Al Harvey Road, Stonington, Connecticut

[fol. 60]

15. Did the decedent die testate?	16a. Were letters testamentary or of administration granted for this estate?	16b. Date granted
☒ Yes ☐ No	☒ Yes ☐ No	Oct. 6, 1958
16c. Case No.	**16d. Name of court**	**16e. Location of court**
	Probate Court District of Hamden	Hamden, Connecticut

16f. To whom granted? (Designate whether executor, executrix, administrator, or administratrix. Explain if different from the person or persons filing return)

NAME	DESIGNATION	ADDRESS (Number, street, city, zone, and State)
The Second National Bank of New Haven	Co-Executor	135 Church Street, New Haven, Connecticut
Harry E. Ross	Co-Executor	129 Church Street, New Haven, Connecticut

GENERAL INFORMATION—Continued

17a. Did the decedent at date of death own property in any State or country other than that of his last domicile? ☒ Yes ☐ No
If "Yes," state place of ancillary probate proceedings

Dublin, New Hampshire (Keene)

17b. Name of ancillary administrator or executor

Harry E. Reed

17c. Address of ancillary administrator or executor (Number, street, city, zone, and State)

129 Church Street, New Haven, Connecticut

18a. Did the decedent at the time of his death have a safe deposit box held either alone or in the joint names of himself and another? ☒ Yes ☐ No
If "Yes," state location

The Second National Bank of New Haven

18b. If held jointly, give the name of the joint depositor

None

18c. Relationship of joint depositor to decedent

None

18d. If the decedent had a safe deposit box at the time of his death, indicate under what schedules in this return the contents are listed

Schedule B

18e. If any of the contents of the safe deposit box are omitted from the schedules, explain why

Not omitted

19. Did the undersigned person or persons filing return make diligent and careful search for property of every kind left by the decedent? ☒ Yes ☐ No

20. Did the same undersigned make diligent and careful search for information as to any transfers of the value of $5,000 or more made by the decedent during his lifetime without an adequate and full consideration in money or money's worth? ☒ Yes ☐ No

21. Did the same undersigned make diligent and careful search for the existence of any trusts created by the decedent during his lifetime or any trusts created by other persons under which the decedent possessed any power, beneficial interest, or trusteeship? ☒ Yes ☐ No

22a. Name of attorney representing estate, if any

Curtiss K. Thompson

22b. Address (Number, street, city, zone, and State)	22c. Telephone No.
205 Church Street, New Haven, Connecticut	LOcust 2-6101

[fol. 61]

ALTERNATE VALUATION

(These instructions apply only if alternate valuation is elected. For further information on this subject, see General Instructions on page 4)

23. An election to have the gross estate of the decedent valued as of the alternate date or dates is made by entering a check mark in the box set forth below.

☒ The executor elects to have the gross estate of this decedent valued in accordance with values as of a date or dates subsequent to the decedent's death as authorized by section 2032 of the Code.

The election cannot be exercised unless it is shown upon the return, Form 706, and the return is filed within 15 months after the decedent's death or within the period for filing the return as extended by the District Director.

The due date for the filing of the return is the day of the 15th calendar month after the decedent's death numerically corresponding to the day of the calendar month in which death occurred, except that, if there is no numerically corresponding day in such 15th month, the last day of such 15th month is the due date. For example, if the decedent died on August 31, 1954, the due date is November 30, 1955. If placed in the mails the return must be posted in ample time to reach the District Director's office, under ordinary handling of the mails, on or before the date on which the return is required to be filed.

SCHEDULE M

BEQUESTS, ETC., TO SURVIVING SPOUSE (MARITAL DEDUCTION)

If the decedent died testate, the person or persons filing the return should answer the following questions. Only question 4 should be answered in case the decedent died intestate. If the answer to any question is "Yes," full details should be submitted with the return.

1. Has any action been instituted to contest the will or any provision thereof affecting any property interest listed on this schedule or for construction of the will or any such provision? ☐ Yes ☒ No

2a. Had the surviving spouse the right to declare an election between (i) the provisions made in his or her favor by the will and (ii) dower, curtesy, or a statutory interest? ☒ Yes ☐ No

2b. If answer to question 2a is "Yes," has the surviving spouse renounced the will and elected to take dower, curtesy, or a statutory interest? ☐ Yes ☐ No

2c. Elected to take under the will. ☒ Yes ☐ No By Inaction

2d. Does the surviving spouse contemplate renouncing the will and electing to take dower, curtesy, or a statutory interest? ☐ Yes ☒ No

3. According to the information and belief of the person or persons filing the return, is any action described under question 1 designed or contemplated? ☐ Yes ☒ No

4. According to the information and belief of such person or persons, has any person other than the surviving spouse asserted (or is any such assertion contemplated) a right to any property interest listed on this schedule, other than as indicated under questions 1 or 3? ☐ Yes ☒ No

Item No.	Description of property interests passing to surviving spouse	Value
1	**See Schedule M hereto annexed**	$

TOTAL	None	$ 4,627,643.41
Less: (a) Federal estate tax payable out of above-listed property interests	$ 281,752.70	
(b) Other death taxes payable out of above-listed property interests		
Total of items (a) and (b)		281,752.70
Net value of above-listed property interests (also enter under the Recapitulation, Schedule O)		$ 4,345,890.71

(If more space is needed, insert additional sheets of same size)

ESTATE OF _____ Schedule M—Page 39.

[fol. 62]

SCHEDULE M

tem

1	Real property known as "Morelands" located in Dublin, New Hampshire being Item 1 Schedule A (Under Article Three of the will)			138,000.0
2	Real property known as #26 Burns Street, New Haven, Connecticut being Item 3 Schedule A (Under Article Three of the will)			16,000.0
3	Real property known as #30 Cliff Street, New Haven, Connecticut being Item 2 Schedule A (Under Article Three of the will)			12,500.0
	Tangible personal property (except Bird paintings, Booklet, and tools and equipment at "Brookfield Farm" (under Article Four of the will)			75,274.0
	Jointly owned property reported in Schedule E			123,872.76
	Widows allowance as ordered by Probate Court			350,000.00
	One-third of the residue (Article Nine, Part 1) calculated as follows:			
	The following items constituting the "Probate Estate:"			
	Real Estate as shown in Schedule A		543,200.00	
	Stocks and Bonds as shown in Schedule B		12,218,274.69	
	Mortgages, Notes and Cash as shown in Schedule C		219,651.46	
	Miscellaneous Property as shown in Schedule F		96,349.00	
			$13,077,475.15	
	less the following:			
	Real property known as "Edgerton" (Article Two)-Item 4 Schedule A	186,500.00		
	Bird Paintings and "Booklet" (Article Two)-Items 17 and 18 Schedule F	20,525.00		
	Pecuniary Bequests (Article Two)	100,000.00		
	Amounts carried forward	$307,025.00	$13,077,475.15	$715,646.76

[fol. 63]

Amounts brought forward	$307,025.00	$13,077,475.15	$725,646.76
Real property known as "Morelands" (Article Three) Item 1 Schedule A	138,000.00		
Real property known as #26 Burns Street (Article Three) Item 3 Schedule A	16,000.00		
Real property known as #80 Cliff Street, (Article Three) Item 2 Schedule A	12,500.00		
Tangible Personal Property to Mrs. Brewster (Article Four) Item 4 above	75,274.00		
Pecuniary Bequests (Articles Five, Six and Seven)	222,650.00		
Widows allowance as ordered by Probate Court	350,000.00		
Administration expenses claimed on 706 (being Items 1 through 71 Schedule J)	45,535.76		
Administration expenses not claimed on Form 706 (reported for information purposes as Items 72 through 98, Schedule J)	77,434.85		
Debts of decedent claimed on Form 706 (being Items 1 through 54 Schedule K)	92,932.51		
Debts of decedent not claimed on Form 706 (reported for information purposes as Items 55 through 58 Schedule K)	4,133.06	1,341,485.18	
		11,735,989.97	
Residue			
1/3 of which is			3,911,996.65
			$4,627,643.41

[fol. 64]

SCHEDULE N

CHARITABLE, PUBLIC, AND SIMILAR GIFTS AND BEQUESTS

Item No.	Name and address of beneficiary	Character of institution	Amount
1	Cornell University	Educational	$
	a) Pecuniary bequest		30,000.00
	b) Remainder interest in bird paintings and "Bachlet" (being Items 17 and 18 in Schedule F) upon death of Mrs. Executor (born July 24, 1907.)		16,268.92
2	City of New Haven	Public	
	a) Remainder interest in Edgerton upon Mrs. Executor's death		147,827.21
	b) Pecuniary bequest		70,000.00
	TOTAL (also enter under the Recapitulation, Schedule O)		$ 264,096.13

(If more space is needed, insert additional sheets of same size)

ESTATE OF ..... Frederick P. Excutor .....

Schedule N—Page 31

[fol. 65]

SCHEDULE O
RECAPITULATION

Schedule	Gross estate	Alternate value	Value at date of death
A	Real estate	$543,200.00	$525,875.00
B	Stocks and bonds	12,218,274.69	12,127,019.57
C	Mortgages, notes, and cash	219,651.46	219,651.46
D	Insurance	None	None
E	Jointly owned property	123,872.76	123,872.76
F	Other miscellaneous property	96,349.00	96,649.00
G	Transfers during decedent's life	None	None
H	Powers of appointment	None	None
I	Annuities	None	None
	TOTAL GROSS ESTATE	$ 13,201,347.91	$ 13,093,067.79

Schedule	Deductions	Amount	
J	1. Funeral expenses and expenses incurred in administering property subject to claims	$ 45,535.76	
K	2. Debts of decedent	92,932.51	
K	3. Mortgages and liens	None	
	4. Total of items 1 through 3	$ ~~138,468.27~~	
	5. Allowable amount of deductions from item 4 (see note*)	$ 138,468.27	
L	6. Net losses during administration	None	
L	7. Expenses incurred in administering property not subject to claims	None	
	8. Total of items 5 through 7		$ 138,468.27
M	9. Bequests, etc., to surviving spouse	$ 4,345,890.71	
	10. Adjusted gross estate (see note**)	13,062,879.64	
	11. Net amount deductible for bequests, etc., to surviving spouse (item 9 or one-half of item 10, whichever is smaller)		4,345,890.71
N	12. Charitable, public, and similar gifts and bequests		264,096.13
	TOTAL ALLOWABLE DEDUCTIONS, except specific exemption (totals of lines 8, 11, and 12)		$ 4,748,455.11

*Note.—See paragraph 1 of the instructions.

**Note.—Enter at item 10 the excess of "TOTAL GROSS ESTATE" over item 8, if the decedent and his surviving spouse at no time held property as community property. If property was ever held as community property, compute the "Adjusted gross estate" (item 10) in accordance with the instructions and example on page 32, and attach an additional sheet showing such computation.

ESTATE OF Frederick F. Brewster

Schedule O—Page 33.

88—16—71698-1

[fol. 65a]

SCHEDULE P

TAXABLE ESTATE—RESIDENT OR CITIZEN

Instructions.—This Schedule Should Be Used only for the Estate of a Resident or Citizen of the United States

1. Total gross estate		$13,201,347.91
2. Total allowable deductions	$4,748,455.11	
3. Specific exemption	60,000.00	4,808,455.11
4. Total deductions plus specific exemption		
5. Taxable estate (item 1 minus item 4)		$ 8,392,892.80

SCHEDULE Q

TAXABLE ESTATE—NONRESIDENT NOT A CITIZEN OF THE UNITED STATES

Instructions.—This schedule should be used only for the estate of a nonresident not a citizen of the United States. See instructions under "Deduction of administration expenses, claims, etc." on page 39. See also instructions under "Specific exemption" on page 39 for amount of specific exemption and names of countries, the estates of whose residents qualify for the "prorated specific exemption." Use Form 706g (Schedule Q (2)) instead of Schedule Q in case of decedent who at the time of his death was domiciled in France or Greece and was not a citizen of the United States. (If the "prorated specific exemption" is claimed under the Japanese convention, the numerator of the fraction set forth in item 7 is the value of the property situated in the United States and subjected to tax by both Japan and the United States.)

1. Value of gross estate in the United States (Schedules A, B, C, D, E, F, G, H, and I)	$
2. Value of gross estate outside the United States, not including real property (must be supported by proof described in instructions under "Deduction of administration expenses, claims, etc., on page 39)	
3. Value of total gross estate wherever situated (item 1 plus item 2)	$
4. Gross deductions under Schedules J, K, and L	$
5. Net deductions under Schedules J, K, and L (that proportion of item 4 that item 1 bears to item 3)	$
6. Charitable, public, and similar gifts and bequests (Schedule N)	
7. Specific exemption of $2,000 (in estates qualifying for "prorated specific exemption," use $2,000 or $\frac{\text{item 1}}{\text{item 3}} \times \$60{,}000$, whichever is the greater)	
8. Total deductions plus specific exemption (item 5 plus items 6 and 7)	$
9. Taxable estate (item 1 minus item 8)	$ None

SCHEDULE R

CREDIT FOR TAX ON PRIOR TRANSFERS

Name of transferor	Date of transferor's death
Transferor's residence at time of death	

COMPUTATION OF THE CREDIT

PART I—TRANSFEROR'S TAX ON PRIOR TRANSFERS	
1. Net value of transfers	$
2. Value of transferor's estate (adjusted in accordance with instructions for item 2)	$
3. Tax on transferor's estate (adjusted in accordance with instructions for item 3)	$
4. Transferor's tax on prior transfers (proportion of item 3 which item 1 bears to item 2)	$
PART II—TRANSFEREE'S TAX ON PRIOR TRANSFERS	
5. Transferee's tax computed without regard to credit allowed under this schedule	$
6. Transferee's reduced gross estate	$
7. Transferee's deductions (adjusted in accordance with instructions for item 7)	
8. Transferee's reduced taxable estate (item 6 minus item 7)	$
9. Tax on reduced taxable estate	
10. Transferee's tax on prior transfers (item 5 minus item 9)	$
PART III—CREDIT ALLOWABLE	
11. Maximum amount before application of percentage requirement (item 4 or item 10, whichever is smaller)	$
12. Percent allowable is	
13. Credit allowable (item 12 × item 11)	$ None

INSTRUCTIONS FOR SCHEDULE S—Continued

daughter's inheritance is $65,000, consisting entirely of stocks of M country corporations. The amount of the M country inheritance tax imposed on the daughter's inheritance is $19,500. M country did not impose inheritance tax on the bonds issued by the M country corporations.

Schedule S is filled out as follows:

1. Amount of estate, inheritance, legacy and succession taxes imposed in the above country attributable to property situated in that country, and subjected to such taxes, and included in the gross estate (as defined by statute)	$22,500.00
2. Value of the gross estate (adjusted)	$200,000.00
3. Value of property situated in that country, and subjected to death taxes imposed in that country, and included in the gross estate (adjusted)	$65,000.00
4. Federal estate tax before allowance of credit for foreign death taxes	$25,820.00
5. Amount of Federal estate tax attributable to property specified at item 3 (proportion of item 4 that item 3 bears to item 2)	$8,301.50
6. Credit for death taxes imposed in the above country (item 1 or item 5, whichever is the smaller)	$8,301.50

The additional sheet showing the computation of the amount of inheritance taxes entered at item 1 sets forth as follows:

Computation of portion of M country inheritance tax imposed upon the widow's inheritance attributable to property subjected to Federal estate tax (instructions for item 1 of Schedule S)—

1. Amount of M country inheritance tax imposed on the inheritance	$21,000.00
2. Value of property situated in M country, subjected to M country inheritance tax and included in the gross estate	$10,000.00
3. Total value of property subjected to M country inheritance tax	$70,000.00
4. Amount of M country inheritance tax attributable to item 2 (proportion of item 1 that item 2 bears to item 3)	$3,000.00

Total M country inheritance tax attributable to property situated in that country and included in the gross estate—

1. For widow's inheritance	$3,000.00
2. For daughter's inheritance	$19,500.00
3. Total	$22,500.00

SCHEDULE S

CREDIT FOR FOREIGN DEATH TAXES

List all of the foreign countries to which death taxes have been paid, credit for the payment of which is claimed on this return .....

If credit is claimed for death taxes paid to more than one foreign country, compute the credit for taxes paid to one country on this sheet and use a separate copy of Schedule S for each of the other countries. The copies of Schedule S on which the additional computations are made should be attached hereto.

The credit computed on this sheet is for Succession Duty Taxes
(Name of death tax or taxes)

..... imposed in Dominion of Canada
(Name of country)

Credit is computed under the Treaty
(Insert "treaty" or "statute")

COMPUTATION OF THE CREDIT

(All amounts and values shown hereunder must be entered in United States money)

1. Amount of estate, inheritance, legacy and succession taxes imposed in the above country attributable to property situated in that country, and subjected to such taxes, and included in the gross estate (as defined by statute)	$ 568.12
2. Value of the gross estate (adjusted, if necessary, in accordance with instructions for item 2)	8,591,361.07
3. Value of property situated in that country, and subjected to death taxes imposed in that country, and included in the gross estate (adjusted, if necessary, in accordance with instructions for item 3) (Alternate Value)	$ 15,750.00
4. Federal estate tax before allowance of credit for foreign death taxes	4,029,181.97
5. Amount of Federal estate tax attributable to property specified at item 3 (proportion of item 4 that item 3 bears to item 2)	$ 7,385.49
6. Credit for death taxes imposed in the above country (item 1 or item 5, whichever is the smaller)	$ 568.12

ESTATE OF Frederick F. Brewster

[fol. 65c]

DECLARATION

We/I declare under the penalties of perjury that this return (including any accompanying statements) has been examined by us/me, and is, to the best of our/my knowledge and belief, a true, correct, and complete return, made in good faith pursuant to the Internal Revenue Code and the regulations thereunder.

Dec 15 1959 (Date)	Harry E Brewster (Signature)	AND	129 Church Street New Haven, Connecticut (Address)
Dec 15 1959	THE [illegible] NATIONAL BANK OF NEW HAVEN, CO-EXECUTOR By F B Stevens Vice President		135 Church Street New Haven, Connecticut

DECLARATION OF ATTORNEY OR AGENT PREPARING RETURN

I declare under the penalties of perjury that I prepared this return for the person or persons named herein; and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return based on all the information relating to the matters required to be reported in this return of which I have any knowledge.

(Date)	(Signature)	(Address)

TABLE A

COMPUTATION OF GROSS ESTATE TAX

Taxable estate equaling (1)	Taxable estate not exceeding (2)	Tax on amount in column (1) (3)	Rate of tax on excess over amount in column (1) (4)
(Dollars)	(Dollars)	(Dollars)	(Percent)
----------	5,000	----------	3
5,000	10,000	150	7
10,000	20,000	500	11
20,000	30,000	1,600	14
30,000	40,000	3,000	18
40,000	50,000	4,800	22
50,000	60,000	7,000	25
60,000	100,000	9,500	28
100,000	250,000	20,700	30
250,000	500,000	65,700	32
500,000	750,000	145,700	35
750,000	1,000,000	233,200	37
1,000,000	1,250,000	325,700	39
1,250,000	1,500,000	423,200	42
1,500,000	2,000,000	528,200	45
2,000,000	2,500,000	753,200	49
2,500,000	3,000,000	998,200	53
3,000,000	3,500,000	1,263,200	56
3,500,000	4,000,000	1,543,200	59
4,000,000	5,000,000	1,838,200	63
5,000,000	6,000,000	2,468,200	67
6,000,000	7,000,000	3,138,200	70
7,000,000	8,000,000	3,838,200	73
8,000,000	10,000,000	4,568,200	76
10,000,000	----------	6,088,200	77

TABLE B

COMPUTATION OF MAXIMUM CREDIT FOR STATE DEATH TAXES

Taxable estate equaling (1)	Taxable estate not exceeding (2)	Credit on amount in column (1) (3)	Rate of credit on excess over amount in column (1) (4)
(Dollars)	(Dollars)	(Dollars)	(Percent)
40,000	90,000	----------	0.8
90,000	140,000	400	1.6
140,000	240,000	1,200	2.4
240,000	440,000	3,600	3.2
440,000	640,000	10,000	4.0
640,000	840,000	18,000	4.8
840,000	1,040,000	27,600	5.6
1,040,000	1,540,000	38,800	6.4
1,540,000	2,040,000	70,800	7.2
2,040,000	2,540,000	106,800	8.0
2,540,000	3,040,000	146,800	8.8
3,040,000	3,540,000	190,800	9.6
3,540,000	4,040,000	238,800	10.4
4,040,000	5,040,000	290,800	11.2
5,040,000	6,040,000	402,800	12.0
6,040,000	7,040,000	522,800	12.8
7,040,000	8,040,000	650,800	13.6
8,040,000	9,040,000	786,800	14.4
9,040,000	10,040,000	930,800	15.2
10,040,000	----------	1,082,800	16.0

[fol. 65d]

ESTATE OF Frederick F. Brewster

U. S. GOVERNMENT PRINTING OFFICE 1960—16—71688-1

[fol. 66]

Exhibit L, Annexed to Affidavit of Charles E. Arntsen

Letter from District Director of Internal Revenue to the executors and accompanying report.

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

COPY

U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
460 CAPITOL AVENUE
HARTFORD, CONNECTICUT

P. O. Box 2158

IN REPLY REFER TO
A:R:30D

OCT 18 1961

Estate of Frederick F. Brewster
Date of Death: 9-16-58

The Second National Bank of New Haven, Co-Exec. et al.
Estate of Frederick F. Brewster
135 Church Street
New Haven, Connecticut

Gentlemen:

The attached report, which has been carefully reviewed by this office, discloses certain adjustments or conclusions resulting from the examination of the ~~return(s) for the taxable year(s) indicated hereinx~~ estate tax return.

If you accept the findings, please execute the enclosed agreement form and return it to this office promptly. If you do not accept the findings, you may, WITHIN 30 DAYS from the date of this letter, file a protest in accordance with the enclosed instructions. Any protest filed will be given careful consideration and, if requested, a conference will be granted by the Appellate Division of the Regional Commissioner's office.

Submission of the agreement form will expedite assessment of the proposed deficiency and stop the running of interest thereon 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest. If desired, payment of the proposed deficiency may be made without awaiting assessment by making remittance therefor payable to the INTERNAL REVENUE SERVICE, at the address shown above, enclosing this letter or a copy thereof. The remittance should include interest on the additional tax (exclusive of penalties, if any) computed at 6% per annum from the due date of the return to the date of the payment.

This is not a statutory notice of deficiency. If, however, upon the expiration of the 30-day period you have not submitted the agreement form, or a written protest, or you have not advised that the deficiency has been paid or will be paid upon notice and demand, a statutory notice will then be sent as provided by law.

Prompt execution and return of the enclosed receipt form indicating your position with respect to the findings disclosed by the report will be greatly appreciated.

IMPORTANT: It is essential that communications transmitting protests or agreements relative to this case be addressed to the District Director of Internal Revenue, Audit Division, at the above address. Please cite the reference shown at the top right of this letter.

Very truly yours,

Donald J. Conley

District Director of Internal Revenue

Enclosures:
Report of Examination
Agreement Form 890-B
Receipt Form (Form 1291)
Instructions IRS Pub. 115
Form
Copy sent to Curtiss K. Thompson, Esq. et al
205 Church Street
New Haven, Connecticut

Mr. Thomas Murphy
Extension 51

[fol. 67]

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PART II

Estate of: Frederick P. Brewster

Date of death: September 16, 1958

PRELIMINARY STATEMENT

STATEMENT OF TAX LIABILITY

	Tax Previously Assessed	Adjustments in this report		Correct Tax Liability
		Deficiency	Overassessment	
Estate Tax	4,028,613.65	1,336,468.40		5,365,082.25

The deficiency [redacted] here results principally from adjustment to the amount allowable as a marital deduction.

[fol. 68]

TABLE OF CONTENTS

Schedule 1. Line adjustments
Schedule 1-A Explanation of changes in gross estate
Schedule 1-B Explanation of changes in deduction
Schedule 2 Computation of tax
[redacted]

FORM 1272
(REV. NOV. 1957)
TRANSLUCENT

U. S. TREASURY DEPARTMENT • INTERNAL REVENUE SERVICE

LINE ADJUSTMENTS – ESTATE TAX

ESTATE OF: Frederick F. Brewster

DATE OF DEATH: September 16, 1958

SCHEDULE: 1

	ITEM	RETURN (a)	ADDITIONS TO VALUE OF ESTATE (b)	DEDUCTIONS FROM VALUE OF ESTATE (c)	CORRECTED (d)
A	Real estate	543,200.00			543,200.00
B	Stocks and bonds	12,218,274.69	875.00		12,219,149.69
C	Mortgages, notes, and cash	219,651.46			219,651.46
D	Insurance				
E	Jointly owned property	123,872.76			123,872.76
F	Other miscellaneous property	96,349.00	1,393.75		97,742.75
G	Transfers during decedent's life				
H	Powers of appointment				
I	Annuities				
	TOTAL GROSS ESTATE	13,201,347.91	2,268.75		13,203,616.66
J	1. Funeral expenses and expenses incurred in administering property subject to claims	45,535.76		478,810.50	524,346.26
K	2. Debts of decedent	92,932.51			92,932.51
K	3. Mortgages and liens				
	4. Total of items 1 through 3	138,468.27		478,810.50	617,278.77
	5. Allowable amount of above deductions	138,468.27		478,810.50	617,278.77
L	6. Net losses during administration				
L	7. Expenses incurred in administering property not subject to claims				
	8. Total (Items 5 through 7)	138,468.27		478,810.50	617,278.77
M	9. Bequests, etc., to surviving spouse	4,345,890.71			2,165,160.02
	10. Adjusted gross estate	13,062,879.64			12,586,337.89
	11. Net amount deductible for bequests, etc., to surviving spouse (item 9 or ½ of item 10, whichever is smaller)	4,345,890.71	2,180,730.69		2,165,160.02
N	12. Charitable, public, and similar gifts and bequests	264,096.13	62,279.89		201,816.24
	Total Allowable Deductions, except specific exemption (totals of lines 8, 11, and 12)	4,748,455.11	2,243,010.58	478,810.50	2,984,255.03
	Specific exemption	~~60,000.00~~			60,000.00
	Total deductions	4,808,455.11			3,044,255.03
	TAXABLE ESTATE	8,392,892.80	2,245,279.33	478,810.50	10,159,361.63

[fol. 69]

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Form 886-A (REV. MAY 1950) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE NO. 1-A
NAME OF TAXPAYER Estate of Frederick F. Browster		Date of death: 9/16/58

EXPLANATION OF CHANGES IN GROSS ESTATE

	Return	Corrected
B—Stocks and Bonds		
Item #199 (j)	97,562.50	98,437.50
Addition to value of estate	875.00	
Totals	98,437.50	98,437.50

Adjustment as to valuation is based upon the mean between the high and low quotations on the valuation date.

F—Other Miscellaneous Property		
Item #19 (added)	-0-	654.21
#20 (added)	-0-	739.54
Addition to value of estate	1,393.75	
Totals	1,393.75 ✓	1,393.75 ✓

Adjustment is made to include in the gross estate insurance refunds collected by the estate (Item #19); and refund of 1949 and 1950 income tax collected by the estate (Item #20).

Form 886-A (Rev. May 1960) TRANSLUCENT

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

EXPLANATION OF ITEMS

SCHEDULE 1-B

Estate of Frederick F. Brewster

Date of death: 9/16/58

EXPLANATION OF CHANGES IN DEDUCTIONS

		Return	Corrected
J-1	Funeral expenses and expenses incurred in administering property subject to claims		
	Item #71	2,825.00	3,102.07
	Schedule Total	45,535.76	524,069.19
	Deduction from value of estate	478,810.50	
	Totals	527,171.26 ✓	527,171.26 ✓

Item #71 is allowed in the amount paid and to be paid as per the evidence on file.

Adjustment as to the ~~sum~~ schedule total is made to correct a mathematical error in the return.

M-0	Bequests, etc. to surviving spouse		
	Item #6	350,000.00	116,666.67
	#7	3,630,243.95	1,682,846.59
	Addition to value of estate		2,180,730.69
	Totals	3,980,243.95	3,980,243.95

Item #6, the deduction claimed in the amount of $350,000.00 as to the widow's allowance ordered by the Probate Court is disallowed in the amount claimed since the same did not constitute a vested property right passing from the decedent to the surviving spouse. The deduction is allowed in the amount of $116,666.67, being one-third of such allowance, which passes as part of the residuary estate, qualifying for the marital deduction.

Item #7, the deduction allowable as to the one-third share of the residuary estate qualifying for the marital deduction is computed as set forth in the statement annexed.

[fol. 71]

FORM 886-A (REV. MAY 1960) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE	SCHEDULE XXXXXX XXXXXX 1-B
NAME OF TAXPAYER	EXPLANATION OF ITEMS	
	Estate of Frederick F. Brewster	Date of death: 9/16/58

EXPLANATION OF CHANGES IN DEDUCTIONS

Computation of One-Third Interest in Residue

Adjusted Gross Estate		12,586,337.89
Less corpus deductions taken for income tax		81,567.91
Available for distribution		12,504,769.98
Less jointly owned property passing to spouse		123,872.76
Balance		12,380,897.22
LESS:		
Widow's Allowance	350,000.00	
BEQUESTS AND DEVISES:		
Clause II Real and personal property given to widow for life, remainder to charity	207,025.00	
" III Real estate specifically devised to widow	166,500.00	
" IV Personal property specifically bequeathed to widow	75,274.00	
" V to VII Miscellaneous Cash Bequests	222,650.00	
Codicil Special Fund	100,000.00	
DEATH TAXES:		
Connecticut Succession Tax on return as filed	845,140.69	
"Compromise" Connecticut Succession Tax on trust for John Brewster (Computation attached)	107,543.30	
Connecticut Estate Tax	149,096.47	
New Hampshire Tax	117.40	
Canadian Succession Duties	568.12	
Federal Estate Tax	5,108,442.48	7,332,357.46
Residue		5,048,539.76
One-Third interest qualifying for marital deduction (Item #7)		1,682,846.59

[fol. 71a]

FORM 886-A (REV. MAY 1940) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE XXXXX XXXXX 1-B
NAME OF TAXPAYER Estate of Frederick F. Brewster		Date of death: 9/16/58

Computation of "Compromise" Connecticut Succession Tax

on Remainder Interest in Trust for John Brewster

Value of trust at date of death		2,095,837.73
Theoretical income at 4%	83,833.51	
Factor for life interest	13.3380	
Value of life estate		1,118,171.36
Value of remainder interest		977,666.37
Class A tax on remainder interest at 8%	78,213.31	
Class C tax on remainder interest at 14%	136,873.29	
Total	215,086.60	
"Compromise" Tax on remainder interest (Average)		107,543.30

[fol. 71b]

FORM 886-A (REV. MAY 1960) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE XXXXX XXXXX 1-B
NAME OF TAXPAYER Estate of Frederick F. Brewster		Date of death: 9/16/58

N-12 Charitable, public, and similar gifts and bequests	Return	Corrected
Item #1 (a)	30,000.00	23,150.70
#1 (b)	16,268.92	15,838.94
#2 (a)	147,827.21	143,920.19
#2 (b)	70,000.00	18,906.41
Addition to value of estate		62,279.89
Totals	264,096.13	264,096.13

Adjustment as to Items ##1(a), 1(b), 2(a) is made to apply the factor of .77169 as to the remainder interests passing to charity upon the death of the surviving spouse, age 74.

Adjustment as to Item #2(b) is made to ~~him~~ apply the factor of .77169 as to the amount payable to the City of New Haven, as per the evidence on file, upon the death of the surviving spouse, age 74.

[fol. 71c]

FORM 1273
(REV. NOV. 1957)
TRANSLUCENT

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

COMPUTATION OF ESTATE TAX

ESTATE OF	DATE OF DEATH	SCHEDULE
Fredorick F. Brewster	September 16, 1958	2

PART I

ITEM	RETURN	CORRECTED
1. Gross estate tax	4,866,798.53	6,210,908.46
2. Credit for State death taxes	837,616.56	845,258.09 *
3. Gross estate tax less credit for State death taxes *(item 1 minus item 2)*	4,029,181.97	5,365,650.37
PART II		
4. Credit for Federal gift taxes	-0-	-0-
5. Credit for tax on prior transfers	-0-	-0-
6. Credit for foreign death taxes	568.12	568.12
7. Total of credits under Part II *(total of items 4, 5, and 6)*	568.12	568.12
8. Net estate tax payable *(items 3 minus item 7)*	4,028,613.85	5,365,082.25
9. Previously assessed		4,028,613.85
10. Deficiency/~~Overassessment~~		1,336,468.40

REMARKS *(Explain if the tax determination may be adjusted due to credit evidence)*

* Limited to amount substantiated by credit evidence on file. Upon submission of evidence of further payment of state death taxes in the amount of $256,639.77; the allowable credit for state death taxes will be $1,101,897.86; the net estate tax payable will be $5,108,442.48; and the deficiency will be $1,079,828.63.

[fol. 71d]

IRS - D. C.

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INSTRUCTIONS AS TO THE PREPARATION OF PROTESTS AGAINST FINDINGS OF EXAMINING OFFICERS

INCOME, ESTATE, OR GIFT TAXES

The protest and any additional statement of facts must be submitted to this office within 30 days of the date of the letter with which these instructions are enclosed. Such protest and statement must be submitted in duplicate under oath of the taxpayer (in the case of a corporation, the oath of a duly constituted officer). The oath requirement may be satisfied by executing the original of the protest under oath and conforming the copy to the original, that is, by making the copy identical with the original except that, in lieu of the signatures of the executing parties appearing on the original, the names of the executing parties may be inserted on the copy by typewriter or otherwise. The protest must contain the following information:

(a) The name and address of the taxpayer (in the case of an individual, the residence, and in the case of a corporation, the principal office or place of business);

(b) The designation by date and symbol of the letter advising of the proposed adjustments in tax liability with respect to which the protest is made;

(c) The designation of the year or years involved;

(d) An itemized schedule of the findings to which the taxpayer takes exception;

(e) A statement of the facts upon which the taxpayer relies with respect to each issue it is desired to contest. No reduction in taxes proposed nor increases in allowance of claims will be made unless the facts relied upon are submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer;

(f) In case the taxpayer desires a hearing before the Appellate Division of the Regional Commissioner's office, a statement to that effect; and

(g) In case the protest is prepared or filed by an attorney or agent, in addition to the signature of the taxpayer, it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true.

If the taxpayer is represented by an attorney or agent, it is essential that the representative be qualified to practice before the Internal Revenue Service either by enrollment or under the provisions of section 10.7 of Treasury Department Circular No. 230 (I.R.B. 1959-7, 6), and that he be provided with a power of attorney signed by the taxpayer, authorizing him to act for the taxpayer. Powers of attorney must be furnished in duplicate with one additional copy for each taxable year in excess of one. If a power of attorney covering pertinent years is presently on file, a new power will not be necessary unless the taxpayer employs a different representative.

[fol. 71e]

YOUR APPELLATE RIGHTS

Upon receipt of a letter from the office of the District Director of Internal Revenue advising you of a proposed adjustment of your tax, you may execute an agreement form consenting to the adjustment or file a protest with the office from which the letter was received, and request a hearing before the Appellate Division of the Regional Commissioner's Office, if one is desired, in accordance with the above instructions. At such a hearing you may appear personally or be represented by an attorney or agent, also as provided in the instructions.

In the event an agreement or a written protest is not filed with the District Director of Internal Revenue, or in case a written protest is filed with the District Director of Internal Revenue, and an agreement is not reached in the Appellate Division of the Regional Commissioner's Office, and your case involves a deficiency, a final notice of the deficiency will be issued in which you will be granted 90 days within which to file a petition with The Tax Court of the United States.

If a petition is filed and docketed, the Appellate Division of the Regional Commissioner's Office will afford you an opportunity to settle your case without the necessity of a trial before The Tax Court. If a settlement cannot be reached, your case will be set down for a hearing before The Tax Court.

Appeal from the decision of The Tax Court may be made to the U. S. Court of Appeals.

If an overassessment only is proposed, the procedure is the same as above, except that your appellate rights do not extend beyond the Appellate Division of the Regional Commissioner's Office, unless the case involves a claim for refund disallowed in whole or in part. In such case, you may file suit with the United States District Court or the United States Court of Claims.

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE Publication No. 5 (Rev. 1-60)

U. S. GOVERNMENT PRINTING OFFICE : 1960 O - 596255

[fol. 72]

EXHIBIT N, ANNEXED TO AFFIDAVIT OF CHARLES E. ARNTSEN

[The Application for Determination of Proration of Federal Estate tax, a part of this exhibit, is omitted here since it has been reproduced above in Exhibit B to the Complaint.]

Order of Notice of Administration Account

District of Hamden, ss. Probate Court.

November 10, 1961

ESTATE OF FREDERICK F. BREWSTER late of HAMDEN, in said District, deceased

Harry E. Ross and The Second National Bank of New Haven, Executors, having exhibited their first administration account with said estate to this Court for allowance,—and made application for Determination of Proration of Federal Estate Tax, it is

ORDERED, That the 27th day of November, 1961, at 2:00 o'clock in the afternoon, at a Court of Probate to be held at Hamden, in said District, be appointed for a hearing on the allowance of said account, and application and that notice of the time and place of said hearing be given by publishing this order once in some newspaper having a circulation in said District,

By the Court,

/s/ Gertrude H. Collins
Gertrude H. Collins Clerk.

(A clipping of this notice is to be mailed to each distributee by the fiduciary)

[fol. 73] Return of Public and Personal Notice.

To the Probate Court for the District of Hamden:

Estate of Frederick F. Brewster late of the town of Hamden, to said District, deceased,

The subscriber hereby makes return, that pursuant to an order of said Court passed on the 10th day of November, 1961, she caused a copy of said order to be published in the Journal Courier, a newspaper having a circulation in said district, on the 13th day of November, 1961,

/s/ Gertrude H. Collins
Clerk

Subscribed and sworn to this 27th day of November 1961 before me

/s/ John E. McNerney
Judge
27th November, 1964

/s/ John E. McNerney, Judge

Return of Public and Personal Notice

To the Probate Court for the District of Hamden:

Estate of Frederick F. Brewster, late of the town of Hamden, in said District, deceased.

[fol. 74] The subscriber hereby makes return, that pursuant to an order of said Court, re first administration account and application for determination of proration of federal estate taxes, passed on the 10th day of November, 1961, he delivered a copy of said order or mailed a copy of said order postage prepaid in letters addressed to the following persons interested, to wit:—

Mrs. Frederick F. Brewster — William Patrick Brewster
Herbert L. Emanuelson, Jr. — Cornell University
Margaret Brewster Sewall — City of New Haven
District Director of Internal Revenue

all on or before the 21st day of November 1961.

/s/ John H. Weir
Attorney for Executors

Subscribed and sworn to this 27th day of November 1961 before me

/s/ Ruth Nicolas
Notary Public
My Commission Expires April 1, 1965.

Received, accepted and ordered recorded this 27th day of November 1961.

/s/ John E. McNerney Judge

[fol. 75] Probate Court,
District of Hamden—ss.

ESTATE OF FREDERICK F. BREWSTER, late of Hamden in said district, deceased

IN THE MATTER OF THE Acceptance of First Administration Account of the Executors and Application for Determination of Proration of Federal Estate Tax.

State of Connecticut,
County of New Haven—ss.

Herbert L. Emanuelson, Jr., of Hamden, Connecticut, being duly sworn, says that he is a Counselor-at-Law: that since his appointment as Guardian ad Litem herein, he has to the best of his ability made himself acquainted with the rights of his ward in the above entitled matter and that he has taken all the steps necessary for the protection of such rights to the best of his knowledge and as he believes that he has examined into the circumstances of the case

—and that there are no legal objections to the acceptance of said account

and to the proration of Federal estate tax as set forth in said application

/s/ Herbert L. Emanuelson, Jr.
Guardian ad Litem.

Subscribed and sworn to before me, this 22nd day of December, 1961.

/s/ Erna V. Freeberg, Notary Public

Received and ordered on record this 26th day of December, 1961.

/s/ John E. McNerney Judge

[fol. 76]

EMANUELSON AND WYNNE
ATTORNEYS AND COUNSELLORS
THE TRUST COMPANY BUILDING
NEW HAVEN 10, CONNECTICUT

Herbert L. Emanuelson, Jr.
John F. Winne

22 December 1961

The Honorable John F. McNerney
Judge of Probate
Memorial Town Hall
Hamden 18, Connecticut

Re: Executors' Application for Determination of Proration of Federal Estate Tax in the Estate of Frederick F. Brewster.

Dear Judge McNerney:

Since the hearing on the Application of the Executors for a Determination of the Proration of the Federal Estate Tax, I have spent considerable time in reviewing the brief filed on behalf of the Executors and in research of the Law.

If the tax were to be computed in accordance with the proposal submitted by the Executors, it will result in substantially the entire tax being paid by the Trusts created under the Will of Frederick F. Brewster from which the minor grandchildren benefit.

[fol. 77] An examination and careful reading of Article One of this decedent's last Will and Testament dated June 5, 1958, makes it clear that the tax on the pre-residuary gifts and transfers is to be borne by the residuary estate. Therefore, it remains necessary to determine whether this Article can apply with like effect to the residuary bequests.

This Article One is far more specific and detailed than the tax clause referred to by the brief in the case *New York Trust Co.* v. *Doubleday,* 144 Conn. 134. However, as the Supreme Court pointed out in that case, if a doubt exists upon examination of the will and the tax clause lacks the clarity necessary to make the proration statute inoperative, then reference must be made to the proration statutes, Sections 12-400 through 12-405 in order to determine the proper computation and proration of the Federal Estate tax.

After a careful examination of this will and the applicable law, together with a thorough reading of the Executors' brief, I am of the opinion that, despite the rather specific and detailed direction contained in Article One, considerable weight must be placed in the argument of the Executors that is the reference in Article One to "beneficiaries of this will" is to include residuary legatees and devisees as well as specific legatees and devisees, that the clause is without meaning and, in fact, a contradiction. I feel that the decision in the case *In the Matter of Estate of Pepper,* (1954) 307 N.Y. 242 must be given considerable weight in the consideration of this application. Therefore, since I am of the opinion that there is no "clear and un-

[fol. 78] ambiguous direction" against statutory apportionment in allocating the Federal Estate Tax against the residuary estate, the Executors should properly look to and

be controlled by Sections 12-400 through 12-405 of the Connecticut General Statutes.

Accordingly, I am filing herewith my report as Guardian ad Litem indicating that I have no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax.

Sincerely yours,

/s/ Herbert L. Emanuelson, Jr.
HERBERT L. EMANUELSON, JR.

Enclosure

Report of Guardian ad Litem

cc: Thompson, Weir, & Barclay, Esquires
205 Church Street
New Haven 10, Connecticut

State of Connecticut,
District of Hamden—ss. Probate Court

December 26, 1961

The foregoing application of the Executors for determination of proration of federal estate tax was heard on November 27, 1961. The applicants were present in Court by their attorneys and Herbert L. Emanuelson, Esq., the guardian ad litem for minor and unborn or undetermined [fol. 79] remaindermen of the trust under Part II of Article Nine of the will and codicil of said deceased, was likewise present.

The Court finds that due notice was given of the pendency of said application and of the time and place of the hearing thereon by publication of the foregoing order of this Court made on the 10th day of November, 1961, in a newspaper having a circulation in this District as appears by the foregoing return which is accepted. The Court

further finds that a copy of such order was delivered or mailed postage prepaid to each of the interested persons named below:

Mrs. Frederick F. Brewster	William Patrick Brewster
Herbert L. Emanuelson, Esq.	Cornell University
Margaret Brewster Sewall	City of New Haven

on or before the 21st day of November, 1961.

After due hearing had and submission by the guardian ad litem of his report dated December 22, 1961, and consideration thereof, this Court finds that the allegations of said application are proved and true, and it is

ORDERED, that the federal estate tax be prorated in the manner and in the amounts set forth in said application and that said Executors are authorized, empowered and directed to charge the prorated amounts against the persons against whom the tax is so prorated as set forth in said application.

/s/ JOHN E. McNERNEY
Judge

[fol. 80] PROBATE COURT
DISTRICT OF HAMDEN

ESTATE OF FREDERICK F. BREWSTER, late of Hamden, in said District, deceased.

MEMORANDUM OF DECISION
ON
EXECUTORS' APPLICATION TO DETERMINE
PRORATION OF FEDERAL ESTATE TAX

The executors, in conjunction with an administration account, have submitted a proposed proration of the federal estate tax, the effect of which is to relieve the residuary trust fund for the benefit of the widow of any part of federal estate taxes attributable to the residuary estate. This would leave the burden of such taxes on the

residuary trust funds for the benefit of the nine grandchildren of testator. The amount of taxes involved is not inconsiderable, so the question is one of importance in the settlement of the estate.

The guardian ad litem who represents the beneficiaries of all the trusts for grandchildren, excepting two who have become twenty-one years of age, has submitted a thoughtful memorandum. Despite the adverse effect of the executors' proposal upon his wards' interests, and the large amount involved, he concludes that the proposed proration is in accordance with the law of this state. My own consideration of the authorities leads me to a similar view and requires me to hold that the proration statute [fol. 81] (General Statutes, sec. 12-400) operates with respect to the residuary gifts. Under the circumstances here, particularly the contents of the will before the codicil was made, and the language of the codicil itself, and the changes which it wrought in the testamentary scheme, I cannot say that Article One of the will is a clear and unambiguous direction against proration among shares of the residue; and such it must be if there is to be no proration in the residue. See *New York Trust Co.* v. *Doubleday,* 144 Conn. 134; *Guaranty Trust Co.* v. *New York Cancer Committee,* 145 Conn. 542; *Jerome* v. *Jerome,* 139 Conn. 285. *The Matter of Estate of Pepper,* 307 N. Y. 242, is a most pertinent authority, as it demonstrates that an attempted construction of Article One to different effect renders it self-contradictory.

The proposed proration allows the trust for the widow to enjoy the benefit of the marital deduction for which it qualifies and which is used in arriving at the value of the real estate for federal tax purposes. This conforms to the proration statute, and I therefore approve the proration submitted by the executors.

December 26, 1961.

/s/ John E. McNerney
Judge

[fol. 82]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed October 29, 1962

The defendant, United States of America, by and through its attorney, Robert C. Zampano, United States Attorney in and for the District of Connecticut, for its answer, admits, denies, alleges as follows:

1. Denies the allegations contained in paragraph 1 of the complaint, except admits that this is an action brought under Title 28, United States Code, Section 1346(a)(1) to recover estate taxes and interest, and alleges that these taxes and interest were paid on December 18, 1959, March 11, 1960, August 19, 1960, and May 29, 1962.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admits that Frederick B. Brewster died on September 16, 1958, and admits that what purports to be a copy of the decedent's will and codicil is attached to the complaint and marked Exhibit A.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except alleges that if the Probate Court for the District of Hamden [fol. 83] did enter an order as alleged by the plaintiff, this order was the result of a collusive and/or nonadversary proceeding and the plaintiff must factually substantiate the propriety of the allowance to the widow for support during the settlement of the estate.

5. Admits the allegations contained in the first sentence of paragraph 5 of the complaint. Denies the allegations contained in the second and third sentences of paragraph 5

of the complaint, except admits that certain property interests were reported on the estate tax return as passing to the decedent's wife and were allegedly deductible under Section 2056 of the Internal Revenue Code of 1954. Admits the allegations contained in the fourth sentence of paragraph 5 of the complaint.

6. Denies the allegations contained in the first sentence of paragraph 6 of the complaint, except alleges that on October 18, 1961, the District Director of Internal Revenue sent a letter to the executors proposing certain adjustments to the net estate, and further alleges that this letter speaks for itself as to the adjustments recommended therein. Admits the allegations contained in the second sentence of paragraph 6 of the complaint.

7. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint, except admits that what purports to be a copy of an application and computation of the proration of the estate tax on the residuary bequest is attached to the complaint and marked Exhibit B.

[fol. 84] 8. Denies the allegations contained in paragraph 8 of the complaint, except alleges that on November 15, 1961, a letter was sent to the District Director of Internal Revenue at Hartford, Connecticut, enclosing an Order of Notice of Administration Account and an Application for Determination of Proration of Federal Estate Tax.

9. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint, except alleges that if the Probate Court did in fact enter an order as alleged by the plaintiff, such order was the result of a proceeding which was collusive and/or nonadversary in nature.

10. Denies the allegations contained in paragraph 10 of the complaint, except admits that a so-called 90-day

letter dated April 6, 1962, was mailed to the executors by the Commissioner of Internal Revenue, which letter disclosed a deficiency of $1,333,194.35 in estate tax liability, and admits that a true and correct copy of this letter is attached to the complaint and marked Exhibit C. Further answering, the defendant alleges that this letter speaks for itself as to the statements contained therein.

11. Denies the allegations contained in paragraph 11 of the complaint.

12. Admits the allegations contained in paragraph 12 of the complaint, except alleges that the plaintiff executed the Waiver of Restrictions on Assessment and Collection of Deficiencies, Treasury Form 890-B, on May 14, 1962, and not on May 12, 1962, as alleged by the plaintiff.

[fol. 85] 13. Admits the allegations contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint.

15. Denies the allegations contained in paragraph 15 of the complaint, except admits that on June 7, 1962, the plaintiff filed a claim for refund and that a true copy of the claim for refund is attached to the complaint and marked Exhibit F, but defendant denies each and every allegation contained in the attached claim for refund except as expressly admitted herein.

16. Admits the allegations contained in paragraph 16 of the complaint.

17. As paragraph 17 of the complaint asserts matters of law, defendant is not required to answer paragraph 17. However, defendant admits that a reasonable amount of attorneys' fees incurred by the plaintiff in prosecuting the claim for refund may be allowable as a deduction to the estate under Section 2053 of the Internal Revenue Code of 1954 or, in the alternative, may be allowable as a deduc-

tion from income in the income tax return of the estate under Section 212 of the Internal Revenue Code of 1954.

18. Denies the allegations contained in paragraph 18 of the complaint, except admits that defendant has received monies of the plaintiff as admitted in this answer to paragraphs 1 and 13 of the complaint, and admits that [fol. 86] the defendant has not refunded any of the sums received to the plaintiff.

Wherefore, defendant prays for dismissal of plaintiff's complaint, judgment in its favor, the costs of this action, and any other relief the Court may deem just and proper.

Robert C. Zampano, United States Attorney, By Arnold Markle, Assistant United States Attorney.

This is to certify that a copy of the within and foregoing Answer has been mailed to Curtis K. Thompson, Esquire, 205 Church Street, New Haven, Connecticut, counsel for plaintiff, this 29th day of October, 1962.

Arnold Markle, Assistant United States Attorney.

[fol. 87]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT—July 25, 1963

Plaintiff's motion for partial summary judgment on the issue of liability, pursuant to Rule 56(c), Fed. R. Civ. P., in this action to recover federal estate taxes in excess of $1,600,000 claimed to have been erroneously assessed and collected, raises questions of importance in the administration of the federal estate tax.

Facts

September 16, 1958 decedent died a resident of Connecticut, leaving a will and codicil. October 6, 1958 they were ad-

mitted to probate by the Probate Court for the District of Hamden, Connecticut.

Plaintiff, named as co-executor in the will, was appointed co-executor by the Probate Court and is now serving as sole executor, the co-executor having resigned May 7, 1962.

Decedent's will, executed June 5, 1958 and modified by a codicil executed July 1, 1958, after providing for certain specific bequests, left the residue in trust, one-third for the benefit of his widow and two-thirds for the benefit of his grandchildren surviving at his death.

[fol. 88] January 5, 1959 an application was filed with the Probate Court for an allowance for the support of decedent's widow during settlement of the estate. February 2, 1959, after hearing, the Probate Court entered an order granting such allowance in amount of $350,000. March 13, 1959, in compliance with the order, the executors paid to the widow the allowance in one lump sum.

December 16, 1959 a federal estate tax return was filed showing an estate tax liability of $4,028,613.85 based on a gross estate of $13,201,347.90 and a taxable estate of $8,392,892.80.

The federal estate tax return showed, as part of the marital deduction,[1] the widow's allowance granted by the Probate Court and one-third of the decedent's residuary estate bequeathed to the widow in trust under the will, the latter computed without reduction by the amount of federal estate tax attributable to the residuary estate.

October 18, 1961, following an IRS audit of the estate tax return, there was forwarded to the executors a report of the examination showing a deficiency due in amount of $1,336,468.40. This deficiency resulted principally from two determinations made by the IRS: (1) disallowance of the $350,000 widow's allowance as part of the marital deduction (but allowance of a marital deduction for this payment in amount of $116,666.67); and (2) decreasing the marital de-

[1] Pursuant to Int. Rev. Code of 1954, §2056, 26 U.S.C. §2056 (1958).

duction claimed by the estate from $3,630,243.95 to $1,682,-846.59. The latter determination was based on the IRS' computation of the widow's share of the residuary estate *after* state and federal estate taxes had been paid; whereas [fol. 89] the executors had computed the widow's share of the residue *before* estate taxes were taken into consideration.

November 10, 1961 the executors applied to the Probate Court for a determination of the proration of the federal estate tax.[2] Notice of the application and hearing thereon was given to the widow, two trust beneficiaries, the guardian ad litem for minor residuary trust beneficiaries and the District Director of Internal Revenue at Hartford. December 26, 1961, after hearing, the Probate Court filed a memorandum of decision and order directing, pursuant to the executors' application, that the federal estate tax on the pre-residuary bequests be deducted from the residuary estate before determining the amount of the widow's one-third part of the residue and that the federal estate tax attributable to the residuary bequests be prorated between those bequests.

April 6, 1962 the Commissioner sent to the executors a 90-day letter indicating that a deficiency of $1,333,194.35 in estate tax had been determined.

May 25, 1962 an assessment in amount of $1,333,194.35, plus interest of $195,285.58, was made against the estate.

May 29, 1962 the taxes and interest as assessed were paid.

June 7, 1962 a claim for refund in amount of $2,500,000 was filed.

August 14, 1962 the claim for refund was disallowed.

August 29, 1962 this action was commenced, pursuant to 28 U.S.C. §1346(a)(1), to recover federal estate taxes claimed to have been erroneously assessed and collected. [fol. 90] By the instant motion for partial summary judgment on the issue of liability, plaintiff seeks a determina-

[2] Pursuant to Conn. Gen. Stat. §§12-400 through 12-405 (1958).

tion on certain questions of law, upon the resolution of which the amount of plaintiff's recovery, if any, in this tax refund action depends.

Questions Presented

Three questions are presented, the answers to which are believed to be dispositive of this motion for partial summary judgment:

(1) Whether the widow's allowance under Connecticut law is a "terminable" interest and therefore not deductible from the gross estate as a marital deduction?

(2) Whether the widow's one-third share of the residuary estate, under the terms of the will, is to be deducted from the residue before the federal estate tax attributable to the residuary bequests is prorated among the residuary legatees?

(3) Whether the Connecticut Probate Court's determination with respect to the widow's allowance and its interpretation of the will with respect to proration of estate taxes are determinative of the rights of the federal government under the revenue laws?

The Court holds that questions (1) and (2) must be answered in the affirmative, question (3) in the negative.

[fol. 91]

I

Widow's Allowance

A widow's allowance granted pursuant to state law during administration of the estate is a "property interest passing from the decedent to his surviving spouse" [3] and

[3] Treas. Reg. §20.2056(e)-2(a) (1958):

"• • • An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. • • •"

qualifies as a marital deduction which may be deducted from the gross estate to determine the taxable estate.[4] A limitation upon the widow's allowance as a marital deduction, claimed by defendant to be applicable here, requires that the allowance, to be deductible, must be one which will not terminate or fail.[5]

[fol. 92] Whether the widow's allowance is an interest which will terminate or fail, is to be determined by state law.[6]

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[4] Int. Rev. Code of 1954, §2056(a), 26 U.S.C. §2056(a) (1958):

"(a) *Allowance of marital deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."

[5] Int. Rev. Code of 1954, §2056(b)(1), 26 U.S.C. §2056(b)(1) 1958:

"(b) *Limitation in the case of life estate or other terminable interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

• • • • • • • •

[6] *United States* v. *First National Bank & Trust Company of Augusta*, 297 F.2d 312, 316 (5 Cir. 1951); *Estate of Michael G. Rudnick*, 36 T.C. 1021, 1023 (1961).

Plaintiff contends that under Connecticut law a lump sum allowance to a widow becomes absolute and indefeasibly vested as soon as the order of the Probate Court directing payment becomes final. Defendant contends that since the right to receive the allowance terminates upon the occurrence of such contingencies as the remarriage or death of the widow and the Probate Court decree may be modified, revoked or set aside on appeal, any award, whether lump sum or installment, is terminable.

By statute[7] Connecticut provides for an allowance to the [fol. 93] surviving spouse during settlement of the estate. Under this statute, the Probate Court exercises "a primary jurisdiction in that discretion is reposed in it to determine whether to make the allowance, and, if it is made, its amount and duration."[8] Among the important considerations to be weighed by the Probate Court in exercising its discretion is the estimated length of time for settlement of the estate and the advisability of a lump sum or periodic installment form of allowance.[9]

A widow's allowance, although characterized as a "statutory right" in one decision,[10] is said to be "not a property right" but "in the nature of a continuance of the support after the husband's death which he or his estate had furnished her before his death".[11] Being within the discretion of the Probate Court, the allowance is subject to an

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[7] Conn. Gen. Stat. §45-250 (1958):

> "The court of probate may allow out of any real or personal estate of a deceased person in settlement before such court such amount as it may judge necessary for the support of the surviving spouse or family of the deceased during the settlement of the estate. . . . "

[8] *Baldwin* v. *Tradesmens National Bank*, 147 Conn. 656, 660, 165 A.2d 331, 333 (1960).

[9] *Havens' Appeal*, 69 Conn. 684, 697-701, 38 Atl. 795, 799-801 (1897).

[10] *Cowles* v. *Cowles*, 74 Conn. 24, 26, 49 Atl. 195, 196 (1901).

[11] *Baker's Appeal*, 56 Conn. 586, 588 (1888).

equitable balancing of interest.[12] Acting on equitable prin-
[fol. 94] ciples, the Probate Court under changing circumstances may revoke or modify its decree granting the allowance.[13]

Plaintiff in the instant case does not dispute the power of the Probate Court to revoke or modify its order granting an allowance to be paid in installments. Rather, plaintiff relies (i) on the fact that the allowance here was in the form of a lump sum award, and (ii) on language in *Havens' Appeal*[14] construing the effect of a revocation or

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[12] " . . . an allowance cannot be granted for the purpose of enriching the widow at the expense of others entitled to the estate or of the rights of creditors in case of insolvency." *Baldwin* v. *Tradesmens National Bank, supra* note 8, at 662, 165 A.2d at 334. See also *Catalano* v. *Catalano,* 148 Conn. 288, 292, 170 A.2d 726, 728 (1961) (marriage contrary to Connecticut public policy deprives surviving spouse of allowance); *Alexander* v. *Alexander,* 107 Conn. 101, 106, 139 Atl. 685, 687 (1927) (abandonment by surviving spouse during lifetime of decedent bars allowance); *Cowles* v. *Cowles,* 74 Conn. 24, 49 Atl. 195 (1901) and *Staub's Appeal,* 66 Conn. 127, 33 Atl. 615 (1895) (valid antenuptial agreement estops surviving spouse from claiming allowance).

[13] *Williamson's Appeal,* 123 Conn. 424, 427, 196 Atl. 770, 771 (1937); *Reiley* v. *Healey,* 122 Conn. 64, 78, 187 Atl. 661, 667 (1936).

[14] *Havens' Appeal, supra* note 9, at 696, 38 Atl. at 799:

> "Had the court, anticipating the estate would be settled in one year, ordered that five thousand dollars be allowed during settlement, the executors could pay no more, however long the settlement might be delayed, unless a new order should be made. Had the court, anticipating the estate would not be settled in four years, ordered that twenty thousand dollars be allowed, the executors could not pay less, however soon the estate might be settled, unless the order were revoked before payment had been made. But the court, recognizing the uncertainty attending the settlement of a large estate, has determined the amount necessary for the widow's support during settlement, in accordance with the time the settlement shall consume, and has ordered that so much per month be allowed during settlement. The executors are thereby authorized to make such monthly payments, until the order is modi-

modification by the Probate Court subsequent to payment of an allowance to a widow.

The Connecticut courts have not distinguished between lump sum and installment allowances in discussing the power of the Probate Court to revoke or modify their orders granting widows' allowances. Absent controlling authority [fol. 95] and recognizing the power of Probate Courts to revoke or modify their decrees, this Court does not find the distinction between lump sum and installment allowances to be helpful in resolving the present question.

It appears that the Probate Court has the power to direct that the widow's allowance be charged against her interest in the estate.[15] The power of the Probate Court to impose an equitable charge against the interest in the estate of the decedent passing to the widow under the will suggests that the widow's allowance, whatever its form of payment, did not, prior to the recent statutory change,[16]

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fied, revoked, or set aside upon appeal; but no revocation can make illegal, payments previously made in pursuance of the order."

[15] *Baldwin* v. *Tradesmens National Bank, supra* note 8, at 663, 165 A.2d at 334; *Havens' Appeal, supra* note 9, at 701, 38 Atl. at 800-801.

[16] Conn. Gen. Stat. §45-250 was amended in 1961 by Public Act No. 370 (approved June 8, 1961, effective October 1, 1961) which added the following two sentences:

"The right to support of a surviving spouse shall vest in such spouse upon the death of his spouse and shall not terminate with his subsequent death or remarriage. Any amount for support allowed to a surviving spouse shall become the absolute property of such surviving spouse or, if deceased, of his estate, without restriction as to use, encumbrance or disposition, and such amount may, upon order of the court, be paid in a lump sum."

This amendment clearly makes the widow's allowance in Connecticut eligible for the marital deduction.

Defendant argues that this amendment confirms that prior thereto the widow's allowance was not a vested, non-terminable interest in Connecticut; otherwise "we can only assume that the Connecticut

[fol. 96] become absolute and indefeasibly vested as soon as the order of the Probate Court directing payment became final.

The Court concludes that under Connecticut law, prior to the 1961 amendment to Section 45-250,[17] the widow's allowance, whether in lump sum or installment form, was subject to revocation or modification; might be the subject of an equitable charge against the widow's interest in the estate; did not become absolute and indefeasibly vested as soon as the order of the Probate Court directing payment became final; was, therefore, as the time it was granted, a terminable interest; and, under Section 2056(b)(1) of the Internal Revenue Code of 1954,[18] is not eligible as a marital deduction.

II

Federal Taxation of Residue of Estate

A major issue before the Court on the instant motion—the issue to which the largest revenue tag is attached—is whether any part of the federal estate tax is chargeable to

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legislature enacted an unnecessary law, an assumption which should not be lightly made."

Plaintiff, on the other hand, argues that "There is no question of changing the law; it is merely a clarification, and the rule that 'an amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act' is applicable. *City of Hartford* v. *Town of Suffield*, 127 Conn. 341, 346, 77 A.2d 760, 762 (1950)."

The Court holds this amendment to be not applicable to the instant case. Moreover, absent authoritative legislative history, the Court finds no basis in the amendment from which to draw inferences one way or the other with respect to the terminability of the interest in a widow's allowance under Connecticut law prior to the amendment.

[17] Conn. Gen. Stat. §45-250 (1961).

[18] Int. Rev. Code of 1954, §2056(b)(1), 26 U.S.C. §2056(b)(1) (1958).

[fol. 97] the interest passing to the widow under the will. This issue turns chiefly upon whether there is a clear and unambiguous direction in the will against proration of taxes.

The original will, executed June 5, 1958, left the residue in trust, one-third for the benefit of the widow and two-thirds for the benefit of the grandchildren surviving at decedent's death. The trust for the widow did not qualify as a marital deduction. All residuary shares were taxable alike.

Article One of the will, which contains the "tax clause", provides:

> "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment of proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

By a codicil executed July 1, 1958, the will was modified so that the residuary trust for the widow qualified for the marital deduction.[19]

The codicil also provided, "In all other respects I hereby republish and confirm my said will."

[fol. 98] The Internal Revenue Code of 1954 allows a marital deduction to the extent of fifty percent of the value of the adjusted gross estate.[20] In determining the value of the marital deduction, the impact of the federal estate

[19] The qualification of the widow's trust for a marital deduction is not disputed.

[20] Int. Rev. Code of 1954, §2056, 26 U.S.C. §2056 (1958).

tax upon the share passing to the widow must be taken into account.[21] Under these statutory provisions there must be a determination whether any part of the federal estate tax is chargeable to the interest passing to the widow.

Applicable state law governs distribution of the estate and the ultimate impact of the federal estate tax.[22] By [fol. 99] statute[23] Connecticut requires death taxes to be prorated equitably except under certain circumstances, the

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[21] Int. Rev. Code of 1954, §2056(b)(4), 26 U.S.C. §2056(b)(4) (1958):

> (4) *Valuation of interest passing to surviving spouse.*— In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—
>
> (A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and
>
> (B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

[22] *Harrison* v. *Northern Trust Co.*, 317 U.S. 476 (1943); *Riggs* v. *Del Drago*, 317 U.S. 95 (1942); *Rogan* v. *Taylor*, 136 F.2d 598 (9 Cir. 1943).

[23] Conn. Gen. Stat. §§12-400 through 12-405 (1958).

Section 12-401(a), insofar as here applicable, provides:

> "(a) When it appears from any administration account or in any appropriate proceeding in the probate court that an executor . . . has paid . . . the federal estate tax . . . the amount of the tax so paid, except when a testator otherwise directs in his will . . . shall . . . be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. . . . [I]n making such proration, allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate . . . "

one here applicable being the direction of the testator to the contrary in his will. If the Connecticut proration statute applies, as plaintiff contends, the trust for the widow, being itself exempt from federal estate taxes, should bear no part of such taxes.[24] If, on the other hand, the proration statute does not apply, as defendant contends, then the federal estate taxes are to be prorated among all shares of the residue, including the widow's trust.[25]

[fol. 100] The specific question for determination is whether the testator intended, under Article One of his will, that the Connecticut proration statute should apply to the residuary shares of his estate.

Certain fundamental canons of construction must be followed.

Republication of a will in the codicil, as here, in effect is the making of a new will as of the date of the codicil, with such changes in the will as are contained in the codicil.[26] That does not mean, however, that in construing the instrument the development of testamentary intent through the will and the codicil and the circumstances surrounding their

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[24] Conn. Gen. Stat. §12-401 (1958); *Guaranty Trust Co.* v. *New York City Cancer Committee*, 145 Conn. 542, 548, 144 A.2d 535, 538 (1958); *New York Trust Co.* v. *Doubleday*, 144 Conn. 134, 143, 128 A.2d 192, 196 (1956); *Jerome* v. *Jerome*, 139 Conn. 285, 292, 93 A.2d 139, 143 (1952).

[25] Resolution of these competing claims with respect to the computation of federal estate tax liability is of importance to both sides. Allowance of plaintiff's claim would result in a decrease of the adjusted gross estate by the entire one-third share of the widow to determine the taxable estate. Acceptance of defendant's claim would result in a larger taxable estate with a corresponding larger tax liability, since the widow's share, before determining the amount eligible as a marital deduction, would be subjected to its proportionate share of the federal estate tax. With a gross estate of $13,201,347.90, the federal estate tax difference between these two positions is substantial.

[26] *First National Bank & Trust Co.* v. *Baker*, 124 Conn. 577, 583, 1 A.2d 283, 286 (1938); *Griffith* v. *Adams*, 106 Conn. 19, 32, 137 Atl. 20, 25 (1926).

execution is to be disregarded and the whole will read as though it were originally made at the date of the codicil. "From a will and its several codicils, like a statute with its later amendments, the maker's full intention is to be gathered." [27]

Moreover, in attempting to determine the intent of the testator, it is necessary to examine not only the particular phrase in question but the language of the entire will in the light of the circumstances which surrounded the testator at the time he executed it, "the real question being, not what did the testator mean to say, but what did he mean by what he did say." [28]

[fol. 101] Finally, the standard which the Court must apply in determining the legal effect of testator's will upon the question of proration of the federal estate tax is that, unless there is a "clear and unambiguous" direction in the will to the contrary, the federal estate tax is to be prorated as provided for in the Connecticut proration statute.[29]

Applying the "clear and unambiguous" standard, the Court finds that Article One of the will is not a clear and unambiguous direction against proration of taxes in the residue of the estate. Accordingly, the Court holds that the Connecticut proration statute applies to the residuary shares of the estate and the widow's trust, being itself exempt from federal estate taxes, should bear no part of such taxes.

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[27] *First National Bank & Trust Co.* v. *Baker, supra* note 26, at 583, 1 A.2d at 286; *Giddings* v. *Giddings*, 65 Conn. 149, 160, 32 Atl. 334, 335 (1894).

[28] *Swole* v. *Burnham*, 111 Conn. 120, 122, 149 Atl. 229, 230 (1930); *McLaughlin* v. *Green*, 136 Conn. 138, 142, 69 A.2d 289, 291 (1949).

[29] *Morgan Guaranty Trust Co.* v. *Huntington*, 149 Conn. 331, 335, 179 A.2d 604, 607-608 (1962); *New York Trust Co.* v. *Doubleday, supra* note 24, at 141, 128 A.2d at 195 (1956); *Jerome* v. *Jerome, supra* note 24, at 289, 93 A.2d at 141; *McLaughlin* v. *Green, supra* note 28, at 142, 69 A.2d at 291.

The first sentence of Article One of the will, in providing for the payment of death taxes, shifted the tax burden for the pre-residuary transfers to the residue of the estate.[30] This shift in the tax burden focuses attention upon the meaning of " . . . beneficiaries of this will or the transferees of such property . . . " in the second sentence of Article One. At the time of making the original will, the residuary shares, not being qualified for charitable or [fol. 102] marital deductions, were taxable and not entitled to any exemption. To attribute to the testator a direction against proration where no proration was possible, would render uncertain what the testator "did . . . mean by what he did say." [31]

Support for this construction may be found in a recent New York Court of Appeals decision:[32]

> "In considering the testator's intention at the time he drafted the tax clause, one further aspect of his original will should be considered. Under the 1949 will, prior to amendment by codicil, the four equal residuary trusts therein set up were fully taxable, since no charitable deduction was allowable for the remainder interests of the Foundation which were contingent upon failure of primary private individual remaindermen.
>
> "Under the original scheme, then, taxes would have been paid out of the capital of the trusts, for there is

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[30] This construction apparently is conceded by both parties. "The directive in the will that all estate taxes be paid from the residue is not a directive against the prorating of estate taxes among residuary gifts." *New York Trust Co.* v. *Doubleday, supra* note 24, at 142, 128 A.2d at 196.

[31] *Swole* v. *Burnham, supra* note 28, at 122, 149 Atl. at 230.

[32] *In the Matter of Will of Shubert*, 10 N.Y.2d 461, 475-476, 180 N.E.2d 410, 417-418, 225 N.Y.S.2d 13, 23 (1962).

The statutes of New York and Connecticut concerning proration of federal estate taxes are similar. See *McLaughlin* v. *Green, supra* note 28, at 142, 69 A.2d at 291.

> no apportionment of taxes between income beneficiaries and remaindermen of a fully taxable trust. . . . Each of the four trusts under the original will thus had the same value for estate tax purposes, and the tax clause, drawn as part of the original will, was meaningless insofar as intra-residuary apportionment was concerned. *Whether apportionment was directed or not,* the tax burden on each residuary trust would [fol. 103] have been the same. The residuary bequests were changed by codicil. Hence it is difficult to perceive how the clause now may be read as an express direction to accomplish something totally unnecessary when it was drafted." (emphasis added)

Plaintiff in the instant case claims, and the Court agrees, that there also is a conflict within the "tax clause" which renders ambiguous the intention of the testator concerning proration. The first sentence shifts the tax burden to the residue; but, according to the second sentence of Article One, the "beneficiaries", assuming they are intended as the residuary legatees, are not to be held for the 'ultimate payment" of death taxes. Such directions in the "tax clause" are at cross-purposes. Obviously some legatees must pay the death taxes out of their share of the estate. To direct that neither pre-residuary nor residuary legatees are to be liable for death taxes, although testator must have known that the taxes must come from one or the other of these sources, renders such directions ambiguous.

In a similar situation the New York Court of Appeals held that conflicting directions in the tax clause precluded a clear and unambiguous direction against statutory apportionment;[33]

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[33] *In Re Pepper's Estate,* 307 N.Y. 242, 250, 120 N.E.2d 807, 811 (1954).

"Someone is obligated to pay the state taxes. . . . if the early direction be followed, viz., that the trusts [fol. 104] be set up freed from all deductions for inheritance, transfer, estate or any other tax, then the direction that the taxes be paid out of the residuary estate is meaningless for the property going into the trusts comprises the entire residuary estate and after the trusts are set up freed from taxes no residuary remains from which taxes can be paid. The first clause directing the trusts to be set up free of tax and the last clause directing all taxes be paid out of the residuary estate cancel out or neutralize each other. The net result is that this will does not contain a direction against statutory apportionment. However, in deciding this case we need not go that far. We need only hold that it *does not contain a clear and unambiguous direction to that effect.*"

Defendant's position, not wholly without appeal, may be summarized briefly: the bare wording of the "tax clause" does direct against proration; the joining of "death taxes" with "just debts" and "funeral expenses" does permit the inference that the testator intended federal estate taxes, as another expense, to be deducted from the residue prior to distribution; and the widow's share was to bear its proportionate burden.

Plaintiff's construction of the tax clause in this will squares, in the opinion of the Court, closer than does that of defendant, with a rational intent of the testator, "the real question being, not what did the testator mean to say, but what did he mean by what he did say."[34]
[fol. 105] The best that can be said for defendant's construction of the tax clause is that, considered in conjunction with that of plaintiff, it gives rise to the very ambiguity which robs the clause of that clarity and lack of

[34] *Swole* v. *Burnham*, *supra* note 28, at 122, 149 Atl. at 230.

ambiguity[35] necessary to constitute a direction against statutory apportionment.

III

Effect of Connecticut Probate Court Decrees Upon Rights of Federal Government Under Revenue Laws

In deciding the widow's allowance question in favor of defendant[36] and the proration of estate taxes question in favor of plaintiff,[37] the Court has considered, but has not regarded itself bound by, the determinations of the Probate Court on each of these questions.

The rationale for the decision of this Court that the decrees of the Probate Court are not binding in the instant case is found in the following statement by Judge Clark (in a case factually distinguishable from the instant case).[38]

> "Although such a decision of the state court may bind the parties in the settlement of their legal rights [fol. 106] between themselves, yet the determination of tax consequences is not to be so resolved. The decision of a state court might well turn on elements of estoppel, laches, acceptance of benefits, rights of third parties, and other incidents of a decisive nature as to them, but in no proper sense to be held prejudicial

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[35] Webster's New International Dictionary (3d ed. 1963):

> "ambiguity . . . 2a(1): The condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time."

[36] *Supra* pp. 6-12.

[37] *Supra* pp. 13-21.

[38] *Daine* v. *Commissioner*, 168 F.2d 449, 451 (2 Cir. 1948). See *Kelly's Trust* v. *Commissioner*, 168 F.2d 198 (2 Cir. 1948) (once state court judgment is appealed, it loses whatever nonadversary or consent quality it may have had).

to the federal revenue. Hence it is clear that the retroactive judgments of state courts do not determine the rights of the Federal Government under its tax laws."

Judge Hincks, while a judge of this Court, although holding, as did the Probate Court, that the testator intended to create separate trusts, rejected any notion that the decree of the Probate Court was binding on this Court.[39]

"The decree of the Probate Court finding that the testator intended to create separate trusts is not binding here. No notice other than by publication was given to the defendant, and the proceeding was uncontested. In *Kelly's Trust* v. *Commissioner*, 168 F.2d 198 (1948), a similar case, the Second Circuit through Judge Frank held that where an appeal is taken the proceeding becomes adversary in nature and binding upon the federal courts. No appeal was taken in the present case, however. See also in this con- [fol. 107] nection, *Reid* v. *Commissioner*, 6 T.C. 438 (1946), where a state court judgment was not followed. I do feel, however, that in view of *Redpath* v. *Auchincloss*, 132 Conn. 690 (1946), the Connecticut courts would find separate trusts in a situation like the present."

The Court of Appeals for the Tenth Circuit has stated succinctly the rule that a state court decree which adversely affects tax rights of the United States and is based upon a nonadversary or collusive proceeding[40] does not

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[39] *McHarg* v. *Fitzpatrick*, 45 Am. Fed. Tax R. 1028, 1033 (D. Conn. 1953), *aff'd*, 210 F.2d 792 (2 Cir. 1954).

[40] As to what constitutes a nonadversary or collusive proceeding, see *Freuler* v. *Helvering*, 291 U.S. 35 (1934); *Blair* v. *Commissioner*, 300 U.S. 5 (1937); *Saulsbury* v. *United States*, 199 F.2d 578, 580 (5 Cir. 1952), *cert. denied*, 345 U.S. 906 (1953).

foreclose the federal courts from determining the tax liability of the parties:[41]

> "Legal rights and interest of parties in property are created and determined by state law but the manner in which and the extent to which such rights and interests shall be subjected to federal tax is determined by federal law. *Morgan* v. *Commissioner*, 309 U.S. 78, 626, 60 S. Ct. 424, 84 L. Ed. 585; *Brodrick* v. *Gore*, 10 Cir., 224 F.2d 892; *Brodrick* v. *Moore*, 10 Cir., 226 F.2d 105.
>
> "While rights and interests of parties in property are created and determined by state law, an order or judgment of a state court obtained through collusion, or attended with some other badge of fraud, or entered in a nonadversary proceeding, is not binding as between one or more parties to such proceeding and [fol. 108] the United States in respect to income or estate tax imposed by federal legislation."

Some federal courts have held likewise;[42] others have held to the contrary.[43]

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[41] *In Re Sweet's Estate*, 234 F.2d 401, 404 (10 Cir. 1956), *cert. denied*, 352 U.S. 878 (1956).

[42] *Kelly's Trust* v. *Commissioner*, 168 F.2d 198 (2 Cir. 1948); *cf. Daine* v. *Commissioner*, 168 F.2d 449, 451 (2 Cir. 1948); *Faulkerson's Estate* v. *United States*, 301 F.2d 231, 232-233 (7 Cir. 1962), *cert. denied*, 371 U.S. 887 (1962); *Stallworth's Estate* v. *Commissioner*, 260 F.2d 760, 763 (5 Cir. 1958); *Merchants National Bank & Trust Co.* v. *United States*, 246 F.2d 410, 415-418, and cases cited at 417 n. 12 (7 Cir. 1957), *cert. denied*, 355 U.S. 881 (1957); *Pitts* v. *Hamrick*, 228 F.2d 486, 490-491 (4 Cir. 1955); *Brodrick* v. *Moore*, 226 F.2d 105, 108 (10 Cir. 1955); *Brodrick* v. *Gore*, 224 F.2d 892, 895-896 (10 Cir. 1955); *Wolfsen* v. *Smyth*, 223 F.2d 111, 113-114 (9 Cir. 1955); *Newman* v. *Commissioner*, 222 F.2d 131, 136 (9 Cir. 1955); *cf. Doll* v. *Commissioner*, 149 F.2d 239, 241-242 (8 Cir. 1945), *cert. denied*, 326 U.S. 725 (1945); *First-Mechanics National Bank of Trenton* v. *Commissioner*, 117 F.2d 127, 129-130 (3 Cir. 1940); *Brainard* v. *Commissioner*, 91 F.2d 880, 883-884 (7 Cir. 1937), *petition for cert.*

[fol. 109] The two decrees of the Probate Court in the instant case were final judgments on matters within that court's exclusive jurisdiction. As such, the decrees are conclusive determinations—*between the parties to the Probate Court proceedings*—of the widow's property rights, first, to the widow's allowance, and, secondly, to receive her share of the residuary estate without reduction by the federal estate tax attributable to the residue.

Defendant does not contend that plaintiff failed to follow the required procedure in submitting the issues to the Probate Court and in obtaining the decrees. Defendant does contend that the decrees of the Probate Court were "the result of a collusive and/or nonadversary proceeding."

This Court, upon the record before it in the instant case, is not able to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature. Nor does this Court believe such a finding is either necessary or appropriate to a determination of the questions presently before the Court. Suffice it to say that, as this Court understands the delineation of federal power

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dismissed, 303 U.S. 665 (1938); *McHarg* v. *Fitzpatrick*, 45 Am. Fed. Tax R. 1028, 1033 (D. Conn. 1953), *aff'd*, 210 F.2d 792 (2 Cir. 1954); *First National Bank of Montgomery* v. *United States*, 176 F. Supp. 768, 772-775 (M.D. Ala. 1959), *aff'd*, 285 F.2d 123 (5 Cir. 1961); See 10 Mertens, Law of Federal Income Taxation, §61.03 (Zimet Rev.) (1958).

[43] *Darlington's Estate* v. *Commissioner*, 302 F.2d 693, 694-695 (3 Cir. 1962); *Beecher* v. *United States*, 280 F.2d 202, 203-204 (3 Cir. 1960); *Babcock's Estate* v. *Commissioner*, 234 F.2d 837, 841-842 (3 Cir. 1956); *Gallagher* v. *Smith*, 223 F.2d 218, 222-227 (3 Cir. 1955) (en banc); *Goodwin's Estate* v. *Commissioner*, 201 F.2d 576, 581-582 (6 Cir. 1953); *Nashville Trust Co.* v. *Commissioner*, 136 F.2d 148, 150-152 (6 Cir. 1943); *Plunkett* v. *Commissioner*, 118 F.2d 644, 648 (1 Cir. 1941); *cf. Channing* v. *Hassett*, 200 F.2d 514, 518-519 (1 Cir. 1952); *Martinson* v. *Wright*, 181 F. Supp. 534, 536 (D. Idaho 1959); *Gordon* v. *United States*, 163 F. Supp. 542, 545-546 (W.D. Mo. 1958); *Stackpole* v. *Granger*, 136 F. Supp. 382, 387-388 (W.D. Pa. 1955); *Weyenberg* v. *United States*, 135 F. Supp. 299, 302-303 (E.D. Wis. 1955).

indicated by Judge Clark[44] and Judge Hincks[45] in this type of situation, it is the duty of this Court to make an independent determination of the rights of the taxpayer and of the rights of the government under the revenue laws of the United States. While this Court will not blind itself to any help which may come from adjudications of the state courts or from any other source, in the end [fol. 110] questions such as those presented by the instant motion for summary judgment, being questions peculiar to the administration of the federal revenue laws, must be decided independently of any state court adjudications. And certainly the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws.

The basis upon which this Court rejects the claimed conclusive effect of the decrees of the Connecticut Probate Court is a broad one, and deliberately so.

Conclusion

For the reasons indicated above, summary judgment on the issue of liability may be entered (1) in favor of defendant on the question of the widow's allowance, and (2) in favor of plaintiff on the question of proration of estate taxes.

The Court assumes, in view of its disposition of these questions, that the parties will be able to stipulate for final judgment.[46] Accordingly, it is ordered that final judgment

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[44] *Daine* v. *Commissioner, supra* note 38.

[45] *McHarg* v. *Fitzpatrick, supra* note 39.

[46] In a letter to the Court dated January 15, 1963, defendant's counsel indicated the following manner of handling the computa-

[fol. 111] be entered within 30 days from the date of this decision; upon stipulation as to the form and amount of judgment, if possible; if not, the form and amount of judgment will be settled upon notice.

If any issues remain unresolved after the procedure suggested above, the Clerk is directed to set the case for trial at the head of the calendar for the next session of court cases to be tried at New Haven.

Dated at New Haven, Connecticut, this 25th day of July, 1963.

William H. Timbers, United States District Judge.

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tions in the event the Court should decide the issues as it now has decided them:

"With respect to the widow's allowance, if this Court should hold that it constitutes a terminable interest (as we contend), then, as a matter of law, the estate of Frederick F. Brewster is not entitled to a marital deduction under Section 2056 of the Internal Revenue Code of 1954.

* * * * * * * *

"If, however, this Court concludes that there was no clear direction against proration within the residue, then the plaintiff is entitled to recover as a matter of law. However, it should be pointed out that the amount which the plaintiff would be entitled to recover must be recomputed based upon a proper application of the Connecticut proration statute, and a proper appraisal of the estate tax liability which would result from the application of the proration statute."

[fol. 112]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[Title omitted]

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT—
Filed September 20, 1963

The defendant, United States of America, by and through its attorney Robert C. Zampano in and for the District of Connecticut, moves this Court to enter judgment in the above captioned case in the amount of $1,295,208.01, plus interest allowable by law, which consists of a refund of tax in the amount of $1,129,726.32, plus interest in the amount of $165,481.69.

United States of America, By Robert C. Zampano, United States Attorney.

[fol. 113]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[Title omitted]

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT—
Filed September 23, 1963

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, plaintiff herein, acting by its attorneys, respectfully moves that judgment be entered in the above entitled matter in the form and amount set forth in the proposed judgment annexed hereto and marked Exhibit A.

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, Late of Hamden, Deceased, By Thompson, Weir & Barclay, Its Attorneys.

[fol. 114]

EXHIBIT A, ANNEXED TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9435

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, Late of Hamden, Connecticut, Deceased

Plaintiff

—against—

UNITED STATES OF AMERICA

Defendant

JUDGMENT

A motion by the plaintiff above named for partial summary judgment in its favor on the question of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure having been duly brought on to be heard, and the Court having made an order thereon denying said motion on the question of the widow's allowance and granting said motion on the question of proration of federal estate taxes, it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff recover of the defendant $1,485,293.86 with interest at the rate of [fol. 115] 6% per annum from the 29th day of May, 1962; and it is hereby further

ORDERED, ADJUDGED and DECREED that this Court retain jurisdiction of this action for the purpose of determining the amount of any deduction for federal estate tax pur-

poses to which plaintiff is entitled for attorneys' fees and expenses incurred in the prosecution of this action.

Dated at New Haven, Connecticut, this day of , 1963.

.....

United States District Judge

IN THE UNITED STATES DISTRICT COURT

ORDER ON CROSS-MOTIONS FOR ENTRY OF JUDGMENT—December 2, 1963

The Court on July 25, 1963 having ordered that partial summary judgment on the issue of liability, pursuant to Rule 56(c), Fed. R. Civ. P., be entered (1) in favor of defendant on the question of the widow's allowance, and (2) in favor of plaintiff on the question of proration of federal estate taxes; and

Cross-motions having been filed by the respective parties for entry of judgment, plaintiff requesting that judgment in amount of $1,485,293.86 plus interest be entered and defendant requesting that judgment in amount of $1,295,208.01 plus interest be entered; and

[fol. 116] The Court having heard arguments by counsel for the respective parties; having received and considered their motions and briefs; and being of the opinion that, since the Connecticut proration statute applies to the residuary shares of the estate, the widow's trust, being itself exempt from federal estate taxes, should bear no part of such taxes (*The Second National Bank of New Haven* v. *United States,* 222 F. Supp. 446, 454 (D. Conn. 1963)); it is

Ordered that plaintiff's motion for entry of judgment be, and the same hereby is, granted; and it is further

Ordered that defendant's motion for entry of judgment be, and the same hereby is, denied; and it is further

Ordered that the Clerk of this Court be, and he hereby is, directed to enter judgment providing

(1) that plaintiff recover of defendant the sum of $1,485,293.86 with interest at the rate of 6% per annum from May 29, 1962, and

(2) that this Court shall retain jurisdiction of this action for the purpose of determining the amount of any deduction for Federal estate tax purposes to which plaintiff is entitled for attorneys' fees and expenses incurred in the prosecution of this action.

Dated at New Haven, Connecticut, this 2nd day of December, 1963.

William H. Timbers, United States District Judge.

[fol. 117]

IN THE UNITED STATES DISTRICT COURT

JUDGMENT—December 2, 1963

A motion by the plaintiff above named for partial summary judgment in its favor on the question of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure having been duly brought on to be heard, and the Court having made an order thereon denying said motion on the question of the widow's allowance and granting said motion on the question of proration of federal estate taxes, it is hereby

Ordered, adjudged and decreed that the plaintiff recover of the defendant $1,485,293.86 with interest at the rate of 6% per annum from the 29th day of May, 1962; and it is hereby further

Ordered, adjudged and decreed that this Court retain jurisdiction of this action for the purpose of determining the amount of any deduction for federal estate tax purposes to which plaintiff is entitled for attorneys' fees and expenses incurred in the prosecution of this action.

Dated at New Haven, Connecticut, this 2nd day of December, 1963.

Gilbert C. Earl, Clerk, United States District Court.

[fol. 118]

IN THE UNITED STATES DISTRICT COURT

DEFENDANT'S NOTICE OF APPEAL—Filed January 24, 1964

Notice is hereby given that the United States of America, defendant above named, appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action of December 2, 1963.

Robert C. Zampano, United States Attorney;

Anthony G. Apicella, Assistant United States Attorney.

This is to certify that a copy of Notice of Appeal has been forwarded to counsel for plaintiff, Curtis K. Thompson, Esquire, 205 Church Street, New Haven, Connecticut, this 24th day of January, 1964.

Anthony G. Apicella, Assistant United States Attorney.

[fol. 119]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTICE OF CROSS-APPEAL—
Filed January 27, 1964

Notice is hereby given that The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, late of Hamden, deceased, plaintiff in the above en-

titled action, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on December 2, 1963 insofar as said judgment denies to the plaintiff damages for failure of the defendant to allow as part of the marital deduction in computing the amount of the federal estate tax on said estate the amount of the allowance to the widow made by the Probate Court for the District of Hamden on February 2, 1959 and paid on March 13, 1959.

Dated: January 27, 1964

Curtiss K. Thompson, John H. Weir, Attorneys for Cross-Appellant, 205 Church Street, New Haven, Connecticut.

[fol. 120] This is to certify that copies of this Notice of Cross-Appeal have been delivered to the offices of the following:

Robert C. Zampano, Esquire, United States Attorney, Post Office Building, New Haven, Connecticut;

Anthony G. Apicella, Esquire, Assistant United States Attorney, Post Office Building, New Haven, Connecticut.

January 27, 1964

John H. Weir.

[fol. 121]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—September Term, 1964.

(Argued March 18, 1965)

Docket No. 28868

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased, Plaintiff-Appellee-Appellant,

—v.—

UNITED STATES OF AMERICA, Defendant-Appellant-Appellee.

Before:

MOORE, KAUFMAN and MARSHALL,*

Circuit Judges.

OPINION—September 28, 1965

Cross appeals by the United States of America, defendant and The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased, plaintiff from a judgment of the court, William H. Timbers, *Chief Judge,* District of Connecticut, entered upon a decision granting summary judgment in favor of defendant on the question of the widow's allowance and in favor of plaintiff on the question of the proration of estate taxes, adjudging that plaintiff recover $1,485,293.86 with [fol. 122] interest and retaining jurisdiction for further proceedings. 222 F. Supp. 446. Appeal by the Executor

* Judge Marshall heard oral argument and participated in the decision in this case, formally concurring therein prior to his becoming Solicitor General.

from the failure to include the widow's allowance as part of the marital deduction not argued, *Jackson* v. *United States*, 376 U. S. 503 (1964), conceded to be controlling.

Reversed.

Curtiss K. Thompson, New Haven, Conn. (John H. Weir, of counsel), for Plaintiff-Appellee-Appellant.

John B. Jones, Jr., attorney, Department of Justice, Washington, D. C. (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson, Robert N. Anderson, Timothy B. Dyk, Benjamin M. Parker, attorneys, Department of Justice, Washington, D. C., of counsel, Robert C. Zampano, United States Attorney, District of Connecticut, on the brief), for Defendant-Appellant-Appellee.

MOORE, *Circuit Judge*:

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster (referred to as the executor* and the Bank), brought this suit to recover federal estate taxes in excess of $1,600,000 allegedly assessed erroneously and illegally against the estate and paid under protest. The facts are not in dispute.

Frederick F. Brewster, a resident of Connecticut, died on September 16, 1958. By will dated June 5, 1958, he made certain specific bequests and directed that "the rest, residue and remainder" be distributed: one-third "thereof" to the [fol. 123] Bank as trustee in trust to pay the income therefrom to his wife, Margaret, for life and upon her death to convey the principal to three of his children; and two-thirds to the trustee to be held in separate trusts for his grandchildren, the trusts to terminate at various times specified in the will. On July 1, 1958, by codicil undoubtedly designed to qualify his wife's one-third for the marital deduction, as

* An individual executor resigned.

authorized by section 2056 of the Internal Revenue Code of 1954, he modified the will to give her a power of appointment over the principal of her one-third; if not exercised, the principal was to go to his three children originally named. In all other respects, except one specific bequest, the will was expressly republished and confirmed.

The will in its first paragraph[1] makes specific provision for the payment "out of my estate" of "death taxes" by directing the executor to pay them along with debts and funeral expenses. The taxes are defined as such as "may legally be assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law." To make doubly certain that the beneficiaries not be charged with estate taxes prorated against their shares, the testator provided that: "The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate." The direction and intent [fol. 124] set forth in paragraph "ONE" would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration.

When the federal estate tax return was filed, Margaret's one-third share of the residue was computed before the residue was reduced by federal taxes, thus placing the entire tax burden on the two-thirds share passing to the

[1] "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

testator's grandchildren. Accordingly, the executor reported a gross estate of $13,201,347.91 from which it deducted specific bequests, debts and administration expenses, the marital deduction comprising Margaret's undiminished share of the residue augmented by a "widow's allowance" of $350,000 made by the Connecticut Probate Court for the District of Hamden but reduced by $281,752.70 of "other death taxes." A taxable estate of $8,392,892.80 was declared on which a tax liability of $4,028,613.85 was reported.

Upon audit, the District Director of Internal Revenue (the Director) disallowed the $350,000 widow's allowance as a part of the marital deduction (one-third, $116,666.67 was allowed because it would otherwise have passed to the marital trust) and decreased the marital trust from $3,630,243.95 to $1,682,846.59. The latter reduction was based upon the Director's construction of paragraph "ONE" of the will as requiring the deduction from the gross estate of all federal, state and state succession taxes before the marital trust of one-third of the residue could be computed. Thus, all the residuary legatees were required to share the tax burden equally. To arrive at his figure, he submitted an "explanation of items" showing an adjusted gross estate of $12,380,897.22 from which he deducted certain bequests, various state taxes and a federal estate tax ($5,108,442.48), leaving a residue of $5,048,539.76, one-third of which, $1,682,846.59, he allowed as the marital trust. Upon the basis [fol. 125] of this adjustment, the Director by 30-day letter asserted a tax deficiency of $1,336,468.40 which the executor paid. This suit for refund followed on the theory that Margaret's share should not have been diminished by federal taxes, thus increasing the marital deduction and eliminating the assessed deficiency.

After receipt of the 30-day letter, the executor in November 1961 applied to the Probate Court in Connecticut for a determination as to how, under Conn. Gen. Stat. sections 12-400, 401(a), 404, 405 (1964 Rev.), the federal estate tax on the residuary bequests should be prorated

between those bequests.[2] The Probate Court approved the executor's proposed proration on the theory that it could not say that under state law there was "a clear and un-
[fol. 126] ambiguous direction against proration among shares of the residue; and such it must be if there is to be no proration in the residue [citing cases]."

Upon motion by the plaintiff-executor for summary judgment, the District Court held (1) that the widow's allowance of $350,000 did not qualify as part of the marital deduction; (2) that the Connecticut proration laws apply because there was no "clear and unambiguous direction" to the contrary; (3) that the federal court was not bound by the Probate Court's determination in virtually a non-adversary pro-

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[2] Section 12-401(a) is the most pertinent of these statutes and provides in part:

> "*Proration of estate taxes. Procedure.* (a) When it appears from any administration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a testator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate . . . "

ceeding; and (4) that the marital trust was not to be reduced by any portion of federal estate tax liability.

Upon appeal the Government asserts error in the trial court's conclusion that the language of paragraph "ONE" of the will is not a clear and unambiguous direction against proration.

The problem to be resolved is succinctly stated (in its brief) by the Executor:

> "... if the Connecticut proration statutes do not apply, as the United States contends, all of the federal estate tax is payable from the estate before the residuary is determined, the widow's trust of one-third of the residue bears one-third of the amount of the federal estate tax and the amount of the marital deduction is reduced by that one-third amount. On the other hand, if the Connecticut proration statutes do apply, as plaintiff contends, the amount of the widow's trust is determined before the payment of the federal estate tax, at least on the residue; that trust, being itself exempt from tax as part of the marital deduction, bears no part of such tax; and the marital deduction is the full amount of the property passing to the widow. Thus, the basic issue is whether or not the Connecticut proration statutes apply in this case."

[fol. 127] It would be difficult to conceive of a clearer direction expressing the thought that death taxes, together with debts and funeral expenses, were to be paid out of the estate. The first sentence of Article One ("I direct my executors to pay out my just debts and funeral expenses and any death taxes . . .") has been held in cases where similar language was construed not only to shift the tax burden to the residue as an expense of administration, *Starr* v. *Watrous*, 116 Conn. 448, 165 Atl. 459 (1933), but also as the equivalent of a direction against proration among the residuary legatees. *Crump* v. *Crump*, 20 Conn. Supp. 471, 140 A. 2d 143 (Super. Ct. 1957). The "inclusion of them

[taxes] in the same classification as debts, funeral expenses . . . " is an expression of "an intention that they should be paid out of the estate in the same way and from the same funds as these other charges." *Starr* v. *Watrous, supra,* 116 Conn. at , 165 Atl. at 460.

Any far-fetched doubt as to the testator's intent in the first sentence of paragraph "ONE" is quickly dispelled by the second sentence in which he specifically declares that "the provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries * * * shall be without effect in the settlement of my estate." The trial court conceded that "the first sentence shifts the tax burden to the residue"; but was of the opinion that "the clause in the second sentence of Article one referring to the ultimate payment of taxes by them [the beneficiaries]" created a conflict with the first sentence and, therefore, an ambiguity in the direction against proration.

There are two fallacies in the trial court's position. First is the assumption that the "beneficiaries" in the second sentence are intended as the residual legatees only and, second, is the assumption, built upon the first, that the residuary legatees "are not to be held for the 'ultimate payment' of [fol. 128] death taxes." From these assumptions, the court reaches the conclusion that, since "some legatees must pay the death taxes out of their share of the estate," "to direct that neither pre-residuary [in the first sentence] nor residuary legatees [in the second sentence] are to be liable for death taxes, although testator must have known that the taxes must come from one or the other of these sources, renders such directions ambiguous." 222 F. Supp. at 454-55. But such ambiguity results only from the court's assumptions—not from the language of the will. The testator was not directing that his beneficiaries were not to be affected in any way by the payment of death taxes. His very explicit treatment of the subject in the initial paragraph evidences his awareness of the necessity of their payment. The sentence deals with the possible provisions

of "any statute requiring the apportionment or proration of such taxes" or of [any statute requiring] "the ultimate payment of such taxes by them." The "them" refers to "the beneficiaries of this will or the transferees of such property." The words "ultimate payment" can refer only to the type of statute which might require ultimate payment on an apportioned basis. Such statute the testator declared was to be "without effect in the settlement of my estate." Thus, in summary, the testator specifically wished to have death taxes paid out of his estate but without proration. Once these were paid, the executor could undertake to comply with his remaining wishes. Ultimately there would be a residue. *A fortiori* without tax deductions from the pre-residuary bequests, the residue would be diminished by the federal estate tax and each of the three trusts equally diminished by one-third of that amount.

Nor can ambiguity be found in the testator's republication of his will to qualify the marital trust under section 2056. The trial court also found an ambiguity in the fact [fol. 129] that a direction against statutory proration was included in the original will although the marital trust was then not qualified as a deduction under section 2056 and was not insulated from the burden of federal estate taxes by the Connecticut proration statutes. The court reasoned that "to attribute to the testator a direction against proration where no proration was possible, would render uncertain what the testator 'did • • • mean by what he did say.'" 222 F. Supp. at 454. The modification in giving his wife a power of appointment over her one-third share does not bespeak any intention to alter his wishes expressed in paragraph "ONE" which was specifically republished and confirmed. Moreover, the will in any event would speak as of the date of death when proration under the Connecticut statutes presented a definite problem to be guarded against. *Union & New Haven Trust Co.* v. *Sullivan*, 142 Conn. 685, 116 A. 2d 908 (1955); *Mead* v. *Close*, 115 Conn. 443, 161 Atl. 799 (1932); *Travis* v. *Wolcottville School Soc'y*, 113

Conn. 618, 155 Atl. 904 (1931). With his attention focused on the consequences of the marital deduction change, the testator had ample opportunity to consider on republication any further special tax treatment for his wife's one-third share had he desired to do so. Thus, the will and codicil must be considered as "the expression of a single testamentary act." *Appeal of Shey*, 73 Conn. 122, 124, 46 Atl. 832 (1900). The reasoning in the opinion of the New York Court of Appeals in *In the Matter of Ellen W. Duryea*, 277 N. Y. 310, 317, 14 N. E. 2d 369, 371 (1938), is persuasive, the court saying:

> "It is clear that it was the intent of the testatrix to direct payment of all gifts, legacies and devises provided for under her will free from and without deduction on account of taxes properly assessed on account of [fol. 130] such gifts, legacies and devises, and that the taxes thereon should be paid out of her residuary estate. It must be assumed, since she affirmed that part of her original will in the codicil by which she gave the powers of appointment, that it was her intention that the taxes assessed on gifts made by her under those powers should likewise be payable out of her residuary estate."

The courts would indeed be making a new will for the testator if paragraph "ONE" were to be interpreted as a direction that federal estate taxes not be paid "out of my estate" but that they be borne solely by the "two-thirds" trusts for the grandchildren. The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death.

The executor and the Government have made extensive arguments as to the effect of the Connecticut Probate

Court's adjudication that the Connecticut proration statutes applied. The trial court after carefully considering the arguments and the many relevant decisions concluded that "the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see *Estate of Hamilton H. Peyton* v. *Commissioner*, 323 F. 2d 438 (8th Cir. 1963), since under Connecticut law the Probate [fol. 131] Court's decisions are not binding on the state's higher courts, *Heiser* v. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 192 A. 2d 44 (1963), and are even subject to collateral attack in another probate district, *Culver's Appeal from Probate*, 48 Conn. 165, 172-174 (1880). Under the circumstances, it was unnecessary "to make a finding as to whether the proceedings in the Probate Court were collusive or non-adversary in nature" and the court properly refrained from so doing.

The question of the District Court's failure to include the $350,000 widow's allowance is no longer before this court because the executor concedes that the Supreme Court's decision in *Jackson* v. *United States*, 376 U. S. 503 (1964), handed down after the trial court's decision and before argument of this appeal, is controlling. In that decision, the Supreme Court held, as did the trial court here, that the allowance was a terminable interest and, therefore, did not qualify for the marital deduction.

Nor is the question of the proper computation of the judgment before us in view of our conclusion that the proration statutes do not apply.

As the Government states (in brief), "In this unusually complicated estate tax case the sole issue is the amount of the marital deduction allowed by Section 2056 of the Internal Revenue Code of 1954 * * *." The intricate alge-

braic formulae and the arithmetical backing and filling required to compute the tax attest to this complexity. See, e.g., 1 CCH Fed. Est. & Gift Tax Rep., ¶2090, at 3056-3087, dealing with the valuation of the marital deduction.

By this decision construing paragraph "ONE" to direct that the proration laws of Connecticut do not apply, we do not intend to foreclose the executor or the Government [fol. 132] from making such adjustments or revisions in the federal estate tax as may be necessary to give full advantage to the estate of the marital deduction as it may be properly computed in accordance with such construction.

The judgment of the District Court is reversed.

[fol. 133]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, deceased, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

JUDGMENT—September 28, 1965

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 153]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—March 21, 1966

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 157]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present:

Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Robert P. Anderson, Hon. Wilfred Feinberg, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—March 21, 1966

A petition for a rehearing in banc having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 159] Clerk's Certificate (omitted in printing).

[fol. 160]

SUPREME COURT OF THE UNITED STATES

No. 240—October Term, 1966

THE SECOND NATIONAL BANK OF NEW HAVEN, etc., Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.